THE TOUCHSTONE OF Wills, Testaments, AND Administrations.

BEING

A COMPENDIUM OF CASES and RESOLUTIONS Touching the same.

Carefully collected out of the Ecclesiastical, Civil, and Canon Laws.

As also out of

The Customs, Common Laws, and Statutes of this Kingdom.

By *G. MERITON*, Gent.

Third Edition.

LONDON,

Printed for *W. Leak, A. Roper, F. Tyton, J. Place, W. Place, J. Starkey, T. Basset, R. Pawlet,* and *S. Herrick*, Booksellers in *Fleet-street* and *Holburn*. 1674.

To all his Loving Country-men.

Dear Friends,

HAving received a deep impression in my thoughts of that Christian-like Moral, *Non nobis Solùm nati sumus, sed partem Parentes, partem Amici, partem Patria vendicant*; I thereupon began seriously to excogitate how I might lay out that small talent which the Lord hath lent me, to the profit and good of my Country: and taking notice of the Quotidian Enmities, Contentions and Quarrels, which arise amongst men about the Devises, Bequests and Legacies of their dead Friends, which most commonly happens by reason of their vitious penning of their Wills and Testaments, and is chiefly occasioned through the scarceness of Writers on this Subject in our English Tongue; there

being very few Books in the same
Language, save Mr. *Swinborne's*
excellent Treatise Testamentary,
which is now almost out of Print,
and can hardly be gotten at any
Stationers; and besides, the price
thereof doth exceed many honest
Countrey-mans purse; and so many
men are left in mists of Ignorance
by reason whereof their Wills and
Testaments are often so strangely
drawn, with so many dubious,
knotty, and sometimes nonsensical
Clauses and Sentences therein, as
that often the Testators meaning
can scarcely, and sometimes not at
all be found out; whereupon it
happens that sometimes the Be-
quests and Devises are void, and
the Legataries lose that which was
intended them: otherwhiles they
are forced to sue for their Lega-
cies, whenas doubts arise upon the
Testators words and meaning in his
Will, and then often the Remedy
proves worse than the Disease, and
mo-

more Charges spent in the Law for the recovery of the Legacy, then sometimes it is worth: Therefore, that my honest Countrey-men may be partly inform'd in some particulars how they may dispose of their Estates at their deaths, and that they may make their Wills according to Law; so that their Intentions and Meanings may not be perverted and wrested to a wrong sense after their deaths, and those who were intended and expected to reap benefit by the Testators death, robbed of their just Rights and Dues; I have thereupon taken the pains to collect several Cases and Resolutions, out of the Ecclesiastical, Civil, and Canon-Laws, & also out of the Customs, Common Laws, & Statutes of this Realm, touching Wills and Testaments, their several Sorts and Forms, what shall be a good Will, who may make one, and who may be an Executor, and of the several ways of appointing them

and also touching Tutors, Chil
drens Portions, Devises and Lega
cies, together with the Probate o
Wills, passing Accounts, paimen
of Mortuaries; and of the power o
the Ordinary in granting of Admi
nistrations; and touching Appeals
and several other things, whereb
my Countrey-men at an easi
charge, and with little expence o
time, may now take a view of thos
things which have so long bee
kept from their sight, under th
Vizard-mask of an unknow
Tongue, and they thereby deprive
of the knowledge thereof. An
now, dear Countrey-men, (for t
you only do I speak) If I can hav
but your good-will, and good-wor
for all this, it shall suffice

Your loving Countrey-ma
and Servant,

GEORGE MERITON

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THE

THE TOUCHSTONE OF WILLS and TESTAMENTS.

CHAP. I.

What a Testament is, with the several Kinds and Forms thereof; and the difference between a Testament, a last Will, and a Codicil.

A Testament is derived of *Testatio Mentis*, and most properly is defined after this manner: *Testamentum est voluntatis nostræ justa Sententia de eo quod quis post mortem suam fieri voluit.* A Testament

ment is a just sentence of our Wi
touching that which one woul
have done after death. *Brac. Latch*
Rep. fol. 137. *Cowells Instit. p.* 117
Swinbrones Wills, &c. part 1. *Sect.* 2
in princ. Justinians Inst. Tit. 10. *l.* 2
de Test. Numb. 1.

2. Every Testament is a la
Will, but every last Will is not
Testament; for a last Will is a ge
neral word, and agreeth to ever
several kind of last Will, or Te
stament; but it's properly to b
called a Testament, when an Exe
cutor is named: for by the namin
an Executor, it differeth from th
rest. *Franc. Mantica de Conjectur*
ultimar. voluntatum, lib. 1. *Tit.* 5
Swin. part. 1. *Sect.* 1. *Simo. de prati*
de Interpretatione ult. vol. lib. 2. *Du*
bium 1. *Solutio* 9.

3. Observe that of Testaments
some be written, some unwritte
or Nuncupative; some solemn, som
unsolemn; some priviledged, an
some unpriviledged: of every kin
whereo

whereof we ſhall ſpeak a word or two. *Michael. Graſſ. Theſaur. com. opinion. Sect. Teſta. Queſtio* 10, 11. *numb.* 1. 3. *Franc. Mantica de Conject. ult. vol. lib.* 1. *Tit.* 7. *Swin. part.* 1. *Sect.* 8.

4. Now as to the formal making of a Solemn Teſtament, many things are requiſite by the Civil Law. As 1. That there be ſeven Witneſſes preſent at the making thereof. 2. They muſt all be required to be there on purpoſe, for it is not ſufficient, if they were there only by chance, and unrequeſted. 3. Every Witneſs muſt ſubſcribe his Name with his own hand, if he can write, or elſe two or three others for him. 4. The Teſtator with his own hand alſo muſt write his own Name, and the Name of him whom he will have to ſucceed him, and have all his goods; and if the Teſtator cannot write, then he muſt name the party (that ſhall ſucceed him) before the Witneſ-

ſes

ses. 5. The Witnesses must be such as are not prohibited in that behalf. 6. The Witnesses must see and behold the Testator, and not hear him only; and the Witnesses also must seal the Testament, either with their own: or the seal of some other. And lastly, the Testament must be finished at one time, without any Intermission, except natural, such as cannot be avoided: And if any of these particulars be not wanting, then it is reputed for a solemn Testament; but here in *England*, we are not necessarily tyed to observe this strict Form of making our Testaments.

5. For with us it is sufficient, if the Testator do appoint his Executor, and declare his Will before two or three Witnesses, whose probation of the same, as concerning the appointment of an Executor, or disposing of Goods and Chattels, is good enough; and such a Testament is called an unsolemn Testa-

ment

nent. *Lyndwood in C. Statut. verb. robatis lib.* 3. *Provincial. Const. Cant. rach. l.* 1. *c.* 16. *Swin. part* 1. *Sect.* 3. *d part.* 4. *Sect.* 24. *Glan. l.* 7. *c.* 6.

6. But if the Testator Devise any Lands, Tenements, or Hereditaments, then the Testament must be in writing, and done in the Life time of the Testator, and approved by him for his Will before his death, except in some special Cases. *See the next Chapter, Num.* 37. 32 *H.* 8. *cap.* 5. *Noy's Maximes, p.* 97. *& Swin part.* 1 *sect.* 11. *& part* 4. *sect.* 25.

7. Also if a man pleaseth he may make his Testament in writing, wherein he disposes of his Goods and Chattels only; and may also use the Testimony of more Witnesses then two, and procure them to subscribe their names to every sheet of the Testament; which is very safe, and may prevent many forgeries. *Swin. part.* 1. *sect.* 10. *num.* 4.

8. The most usual form of Wills and Testaments with us here in *England*, is after this manner. *In the Name*

The form of a Testament or last Will.

of God Amen. The tenth day of April, 1667. *in the nineteenth year of the Reign of our most Gracious Sovereign Lord King* Charles *the Second of* England, &c. *I* Peter Style *of* B. *in the County of* York, *Gent. being sick and weak in body, but of sound and perfect memory, (thanks be to Almighty God for the same) And calling to mind the uncertain state of this transitory life and that all flesh must yield unto death, when it shall please God to call: and being desirous to settle things in order, do make this my last Will and Testament, wherein is contained my last Will and Testament in manner and form following; revoking, and absolutely unwilling by these Presents, all and every Testament and Testaments, Wills and Wills heretofore by me made and declared*

A special Revocation of a former Will. *See the next Chap. Num.* 34.

clared either by word or by writing, notwithſtanding any promiſe to the contrary, or Clauſe derogatory in the ſame: And this to be taken only for my laſt Will and Teſtament, and none other. First, I bequeath my Soul to Almighty God my Maker, and to Jeſus Chriſt my Redeemer, and to the Holy Ghoſt my Sanctifier; and my Body to the Earth from whence it came, to be buried in ſuch decent and Chriſtian manner, as to my Executors ſhall be thought meet and convenient; there to reſt, until my Soul and Body ſhall meet again, and be joyned together at the joyful Reſurrection, and be made Partakers of the never-fading Joys of Immortality, which God in Mercy, through the Merits of Jeſus Chriſt alone, hath promiſed and prepared for all thoſe that truly and unfeignedly repent and believe in him. And touching ſuch temporal Eſtate of Goods, Chattels and Debts, as the Lord hath been pleaſed, far above my deſerts, to beſtow upon me: I do order, give, be-

bequeath, and dispose the same in manner and form following. Imprimis, I give and bequeath unto my son Henry Style, when he shall attain the age of one and twenty years, the summe of forty pounds of lawful money of England, to be paid to him by mine Executors hereafter named. Item, I give and bequeath to my Son Thomas Style forty pounds of like money, to be paid to him (by my said Executors) when he shall attain the age of one and twenty years. Item, I give, &c. And lastly, I make constitute, ordain and appoint my dear and well beloved Wife Mary Style sole Executrix of this my last Will and Testament to whom I bequeath all the remainde of my Goods and Chattels, moveable and immoveable, after the satisfaction of my Debts, and payment of

Observe the difference between the two Bequests; In the first Case nothing is due till the age of 21 years; but it is otherwise in the second Case for there it may be recovered by the Executors or Administrators of the Child, though he die before the age of 21 years.

f the Legacies above by me bequeath-
d. And to her care and tuition also I
ave all my Chil-
ren, and I do here-
y nominate and
ppoint my said
Wife Tutrix to them and every of
hem, until such time as they shall
verally attain their ages of one and
wenty years. In witness whereof I
ave hereunto set my hand and
al, the day and year first above-
ritten.

A clause whereby the tuition of the Testators Children is committed to the Executor.

Peter Style.

9. But no man is tied to observe his or any other set-form in the making of his Will for it skills not how it be drawn, so as the Testators meaning can be but found out, neither is it material whether the Testament be written in parchment or paper, or the like stuff apt for writing; nor what Language the same be written in, either Latin, Greek

Greek, French, or any oth
Tongue; nor whether the same
written in Secretary, Roman,
Court-hand, or any other han
so that the same may be but re
and understood; nor is it mater
with what Notes or Characte
the same may be made, as XX *s.*
twenty shillings, CL *l.* for an hu
dred and fifty pounds, 1590 for
thousand five hundred and nine
with such like; or the Figure (1)
stead of the Letter A. Or (2)
stead of the Letter B. *&c.* or so
other more strange Characters;
it is good enough, if the same
any means can be but read and
derstood; unless the same Writi
be but only a Preparation to
Testament, and not the Testame
it self: for then in such case, thou
the same may be read and unde
stood, yet it is of no force and
party shall be said to die Intesta
Michael. Graff. Thesaur. com. opin.
sect. Test. Quest. 10. *Swin. part.*

ect. 25. num. 2, 3, 4, 5, 6. Juſtinians inſt. l. 2. Tit. de Teſt. ordinandis numb. 12.

10. Word and Sentences alſo are not of neceſſity required for the form of a Teſtament, but only for the expreſſing of the will and meaning of the Teſtator; and therefore if the Scribe omit ſome words by Error, whereby the ſenſe is imperfect: As for Example, if he write thus; *I make my Wife my of this my Laſt Will and Teſtament*, leaving out this word *Executrix*; yet in this Caſe his Error ſhall not hurt it; for the Law doth preſume more was ſpoken, though leſs was written; and therefore ſhe ſhall be taken for Executrix. *Swin. part. 4. ſect. 25. numb. 7. Molin. in l. 1. c. de Teſt. ſect. de verb. ob. numb. 8. in fin.*

11. Alſo if there be no Witneſſes of a written Teſtament, yet if it be certain and undoubted that the Teſtament is written or ſubſcribed with the Teſtator's own hand, it is ſuf-

sufficient, but if it be doubt
whether it is his hand or no, th
the Testimony of Witnesses is n
cessary to confirm the same to
the Testators own hand: or whe
there is no suspicion of fraud, pro
may be made and allowed by com
paring of hands with other wr
tings signed by the Testator. *M*
chard de probat. verb. Testament. Co
clus. 1352. *numb.* 60. *Swin. part.* 4. *sec*
25 *num.* 8. *M. chael. Graff. Thesau*
com. opinionum, sect. Inst. 2. 1
n. 6.

12. Having spoken of a writte
Testament, we shall now she
what a Nuncupative Testament i
and that is where the Testator b
word of Mouth, before a sufficie
number of Witnesses, doth declar
his Mind, and names his Executo
and this Testament is of as gre
force and efficacy as a written Te
stament, except where Lands, Te
nement and Hereditaments are de
vised: and to the making of thi

Nun

Nuncupative Testament no precise form of words is required, neither is it material whether the Testator speak properly or improperly, so that his meaning do appear, as is shewed before. It is called *Nuncupative, à Nuncupando, id est, Nominando*, of naming an Executor; and is most commonly made when the Testator is very sick and weak, and past all hope of recovery. *Molineus in l. 1. sect. Test. ordin. ff. de verb. obl. numb. 8. in fin. Just. Instit. sect. de Test. ordinandis in fine. Minsing. in D. sect. final. Swin. part. 1. sect. 12. & part. 4. sect. 26. Terms of the Law verb. Devise. Noye's Maximes, p. 96. Perkin, numb. 76.*

13. If such a Testament be put in writing after the Testators death, yet it remains a Nuncupative Testament still. *Noye's Maximes, pag. 96. Swin. part. 1. sect. 11. numb. 3. in prin.*

14. A man hath that privilege in a written Testament, which he cannot have in a Nuncupative Testament; for in a Nuncupative Testament he must publish and declare his minde; but in a written Testament he may seal up his minde, and keep it secret till after his death; only it behoves him to shew the same after it is sealed up to some Witnesses, and say unto them, This is my last Will and Testament, or, Herein is contained my last Will; and so let them set their hands to some parts thereof, or otherwise to take such special Notes and Marks thereof, as that they be able to prove the Identity of the Writing after the Testator's death; and in such Case it is good enough though none of the Witnesses were privy to the contents thereof. *Paris. Consil. 19. vol. 3. num. 25, 26, &c. Muschar. Tract. de Probat. Conclus. 10. 1352. numb. 17. Clar. sect. Test. Quest. 4. numb.*

Swi

vin. part. 1. *sect.* 11. *numb.* 6, 7, 8, 9. *mo. de Prætis. de Interpretat. ult. lun. l.* 1. *f.* 31.

15. As touching priviledged Testaments, there are Three sorts thereof; *viz. Testamentum Militare, Testamentum inter Liberos, Testamentum ad pias Causas*: That is, a Testament made by a Souldier, a Testament made by a Father amongst his Children, and a Testament made for good and godly uses. Some other there are also, but their priviledges are but small in comparison of these. *Mantica de Conjectur. lt. voluntat. lib.* 1 *Tit.* 57. *in. fin. vin. part.* 1. *sect.* 13.

16. As to the first of these, it is observable among the *Civilians*, That a Souldier in Arms, and in actual service of Wars, is not disabled by any of those impediments whereby others are disabled to make their Testaments, except in Cases of *Furor*, or lack of Reason, and for other causes also when he is disabled

Jure

Jure gentium. And whereas there be divers which be prohibited to be Executors or Legataries to other persons, yet notwithstanding they be Executors or Legataries to a Souldier, except in some few Cases. And whereas also no other person can die with two Testaments, yet a Souldier may, and both Testaments shall be deemed good, according to the will and meaning of the Testator. And likewise where as another person cannot by the Civil Law die partly testate, and partly intestate, yet a Souldier may *Minsing. in Tit. de Milit. Testamen. Instituend. in principio. Fit. Abr. Tit. Execut. num. 26. Fran. Mantica de Conject. ult. vol. l. Tit. 1. num. 32. Swin. part. 1. sect. 1. Mich. Graff. Thesaur. com. opin. sect. Tit. Stam. Quest. 3. num. 1. Swin. part. 7. sect. 11. num. 5.*

17. As to the Second, where the Father maketh his Testament, and nameth his lawful and natural Chil-

dre

ren his Executors, and giveth hem the residue of his Goods; to his kind there also belongeth several priviledges; for if there be ound after the Testators death two Testament of divers Tenors, and t doth not appear which is first, or which is last; in this Case, the Testament made in favour of the Testator's Children shall be deemd the later, and shall take place; whereas if neither be in favour of he Children, nor otherwise prividged then both are void; except it be in case of a Souldier, who y the Civil Law may die with two Testaments as aforesaid. Also a Testament made in favour of Children is not so easily revoked as other Testaments are: for whereas n other Testaments the former is evoked by the latter, and that *ipso jure* without any express revocaion; yet by the Civil Law a Teament among Children is not reoked by a latter Testament, where-

in ſtrangers are preferred, unleſs it be mentioned and revoked by expreſs words; or unleſs the latter Teſtament be made *ad pias cauſas*, or elſe ſome great Diſpleaſure or Enmity have hapned betwixt the Father and Children, or ſome like cauſe have come to paſs, whereby it may be made appear, that the Father did repent him of the making of the ſaid Will. And laſtly another priviledge belonging to this Teſtament is, That if there be no witneſſes to prove the ſame, yet if the Teſtament be found among other Writings in the Teſtators Cheſt, or like place, and undoubtedly appear to be written or ſubſcribed with the Teſtators own hand, or by him procured to be written by ſome other; then in ſuch Caſe it is good enough; but this Priviledge alſo is allowed to all other Teſtaments here with us in *England*, as is ſhewed before *Num.* 11. See the next Chapter

Na

Num. 33. 40. *Clar. ſect. Teſt. Queſt.* 100. *Franc. Mantica. de conject. ult. Volunt. l.* 6. *Tit.* 2. *Swin. part.* 1. *ſect.* 3. *Mich. Graſſ. Theſaur. commun. opin. Sect. Teſtam. Queſt.* 86. *Num.* 11.

18. The third kind of priviledged Teſtaments, are thoſe which are made to pious uſes; as when one gives his Goods to be diſtributed to poor Orphans, Widows, Strangers, Priſoners, lame and diſeaſed poor perſons, or to Hoſpitals, Churches, repairing of Bridges, or the Walls of a City or Town, when the ſame be decayed and ſtand in need of repairing; and to ſuch Teſtaments belong many priviledges alſo. As firſt, it may be written with ſtrange and unaccuſtomed Characters and Notes, and yet the ſame ſhall nevertheleſs be as effectual, as if the ſame had been written after the uſual and accuſtomed manner. Alſo, if ſuch a Teſtament be found cancelled, and it is not known whether the Teſtator did

willingly and wittingly cancel the ſame or no; in this Caſe, it ſhall be preſumed to have been cancelled unadviſedly, and ſhall take effect notwithſtanding, as if it had not been cancelled at all; whereas in other Teſtaments the contrary is preſumed. And another Priviledge is, That ſuch a Teſtament is not void for incertainty (as other Teſtaments are;) and therefore if the Teſtator ſay, *I make the Poor my Executors*; or, *I will that my Goods be diſtributed amongſt the poor*; ſuch manner of appointing Executors or Legacies is good. Alſo if there be two Teſtaments found of diverſ Tenors, and it doth not appear which is laſt; in this Caſe if one of them be made *ad pias cauſas*, that ſhall be preſumed to be laſt made, and take effect, unleſs the other Teſtament be *inter liberos*, and then that ſhall be deemed laſt, and not the Teſtament *ad pias cauſas*. There are ſeveral othrr pri-

viledg

viledges reckoned up by ſome Authors to belong to this kind of Teſtament; for *Tiraquel. in Tract. de privilegia piæ cauſæ*, reckons up 170 Priviledges belonging to ſuch a Teſtament; but moſt of them are here in *England* allowed to all Teſtament, though they be not made *ad pias cauſas France. Mantic. de conject. ult. voluntat. l.* 6. *Tit.* 3. *num.* 3. *&* 43. *& l.* 32. *num* 30. *tit.* 1. *& Tit.* 2. *num.* 25. 32. *Swin. part.* 1. *ſect.* 16. *& part.* 7. *ſect.* 8. *num.* 8. *& ſect.* 16. *in fin. Tiraquel. de privilegia piæ cauſæ.* 12, 16. *&* 56.

19. Unpriviledged Teſtaments are thoſe which have not any freedom or benefit contrary to the common courſe of ordinary Law, but are tied to ſuch obſervations as the Law requireth, and hath appointed regularly for all Teſtaments. *Swin. part.* 1. *ſect.* 17.

20. Now having ſpoken ſomething of *Teſtaments Solemn* and *Unſolemn*, *Written* and *Unwritten*, *Priviledged*

viledged and Unpriviledged; I ſha ſpeak a word or two of *Wills* an *Codicils*, and ſo conclude this Chap ter.

21. The definition of a Laſt Wi differeth but little from that of Teſtament; for a Laſt Will i thus defined, *Ultima voluntas eſt le gitima diſpoſitio, de eo quod quis po mortem ſieri, velit*, A Laſt Will i a lawful diſpoſing of that, whic any one would have done afte death. *Franc. Mantica de conjec ult. voluntat. l.* 1. *Tit.* 4. *num.* 10. *Swi part.* 1. *ſect.* 4.

22. There is alſo another kin of Will called a *Codicil*, and is de fined after this manner, *Codicill eſt voluntatis noſtræ juſta ſententia de eo quod quis poſt mortem ſuam fier velit abſque Executoris conſtitutione* A Codicil is a juſt Sentence of ou Will, touching that which an one would have done after hi death, without the appointing o an Executor: by force of whic

laſt

last words a Codicil is made to differ from a Testament; for a Testament can no more consist or be without an Executor, then a Codicil can admit of an Executor. *Swin. part. 1 sect. 5. num. 2. Franc. Mantica de conject. ult. voluntat. l. 1. Tit. 8. num Justinians Inst. l. 2. Tit de Codicillis, num. 2.*

23. These Codicils are most commonly made by the *Testator*, after he hath made his Testament, wherein he hath forgotten something which he hath a mind to put in; and then it is done by way of Codicil, and annexed to the Testament: but whether it be made before or after the Testament, it is to be taken and reputed for parcel thereof, and ought to be performed as well as the Testament, unless being made before the Testament, it appear to be revoked in the Testament, or be contrary to that which is contained in the Testament. *Reformatio Legum Ecclesiasti-*

cum tit. de Teſtam. cap. 5. 1. ſect. 5. num. 11. Juſtin. l. de Codicillis, num. 1. Jur. Civilis, part. 4. l. 9. cipio.

24. When a Codicil is made by one that dieth Inteſtate, the Legacies therein given muſt be paid by him that hath the Adminiſtration of the Goods of the Deceaſed, as if he were Executor. *Bro. Abr. tit. Deviſ. num. 35. Swinbor. part. ſect. 5. num. 10.*

25. In ſome reſpect Codicils and Teſtaments are quite contrary to one another; for whereas a man cannot die with two Teſtaments, (becauſe the latter doth always infringe the former, except in ſome ſpecial Caſes) yet a man may die with divers Codicils, and the latter doth not hinder the former, ſo long as they be not contrary to one another. Alſo where two Teſtaments are found, and it doth not appear which was firſt, nor which

In this Caſe they are both
kept in ſpecial Caſes, as is
before, *Numb.* 17. & 18. But
Codicils be found, and it
cannot be known which was firſt
or laſt, and one and the ſame thing
given to one perſon in one Codi-
cil, and to another perſon in ano-
ther Codicil; here the Codicils
are not void, but the perſons there-
in named ought to divide that thing
betwixt them by the Civil Law.
*Michael. Graſs. Theſaur. commun. opi-
nion. ſect. Codicillus. Swin. part.* 1. *ſect.*
in fine.

CHAP. II.

What ſhall be a good Teſtament or Will, and what not.

6. THat Wills and Teſtaments may lawfully appear, it is neceſſary that there be ſufficient proof, either by writing or by wit-

nefs; and as to that know, that t
Witneſſes are ſufficient, if they
without lawful exception. *Cowe*
Inſt. p. 118. *Waterhouſe on Forteſc.*
350. *Glan. l.* 7. *c.* 6. *Bract. l.*
cap. 16. *Swin. part.* 4. *ſect.*
numb. 2.

27. That is, if they be not pe
jured perſons, or perſons of inf
mous life, or Malefactors, or La
breakers; or Children, Idiots, Lun
tick perſons; or of the Kindred
Alliance, or Tenants or Servants
the party producing them, or Ca
tal Enemies to the party agai
whom they are produced, or pe
ſons who are to reap benefit
their diſpoſitions, or ſuch like, &
Cowel on Lit. fol. 6. *Swin. part.* 4. *ſe*
21. *Maſchard. de probat. verb. pri*
Concluſio 1168. *& verb. Criminoſ*
Concluſ. 469. *& verb. Furioſus Co*
clu. 128. *Swin. part.* 4. *ſect.* 21. *nu*
7. 9, 10. *Ref. Legum Eccleſ. T*
de Teſtamentis, c. 17. *Waterhouſe*
Fortеſcue fol. 357. *&* 358.

28. B

28. But if the exceptions be but ſmall, and ſuch as do but in part diminiſh the Witneſſes credit, as the exception of friendſhip, houſehold-ſervant, or ſuſpition of ſome ſmall fault, then the number may ſupply the defect; and ſo the Teſtimony of three or four witneſſes, not altogether clear from thoſe exceptions, is as good as the Teſtimony of two Witneſſes without all exception. *Franc. Mantica de Conject. ult. voluntat. l. 6. Tit. 3. numb. 8. Swin. part. 4. ſect. 21. numb. 3.*

29. And ſometimes the Teſtimony of one Witneſs is ſufficient; as where the Teſtator in his lifetime commits ſomething in ſecret to ſome one perſon (being loth perhaps that any other ſhould know it) and willeth that that ſame perſon ſhall be credited for the Declaration of his Will; in ſuch caſe that perſon alone is ſufficient to prove the Contents of the

the last Will and Testament of the person deceased. *Olden. de Probation. fol.* 286. *b. Swin. part.* 4. *sect.* 21. *numb.* 4.

30. The Testimony of a Legatary also is allowed in probate of Wills, but not for his or their own Legacies: but for all the rest of the Will it is good enough. *Fustin. Inst. l.* 2. *Tit. de Test. ordinan. num.* 11. *Swin. part.* 4. *sect.* 21. *numb.* 11. *Portius in de sect. Legatur.*

31. But note, if a man in perfect health be demanded, who shall be his Executor, or have his goods after his death (which question is very familiar and common amongst companions) and forthwith he names some person, to whom he faith he will leave his goods after his death; This is not to be taken for a Testament, or last Will, neither is that person named to be admitted Executor, nor to have his goods, unless it be proved that the Testator at the time when the words

ords were ſpoken had *Animum*
ſtandi, that is to ſay, a full mind
d reſolute purpoſe at that time to
ake his Teſtament or laſt Will;
nd this purpoſe muſt be proved by
rcumſtances as well as by words;
that he framed himſelf very ſe-
ouſly to the making of the ſame,
eſiring them that were preſent to
ear Witneſs of his Will, *&c. Juſt.*
ſt. l. 2. Tit de Milit. Teſtamento,
umb. 1. Swin. part. 1. ſect. 3. numb. 24.
Henoch. de Arbitrio Judicis, c. 496.

32. Note, that the laſt Teſtament
oth always make void the firſt,
xcept in ſome ſpecial caſes, as
here the latter is made through
aſt fear, or by cunning and deceit-
ul fraud or flattery, or at the im-
ortunate requeſt and deſire of an-
ther perſon who expects to reap
enefit thereby, eſpecially if the
Teſtator be very ſick at ſuch time,
nd do it to be at quiet and reſt; in
heſe caſes the latter Teſtament
hall not make void the former, but

the

there must be Witnesses to pro
these things, if the parties co
cerned intend to make void the la
ter Testament. *Menoch. de Arbit*
Jud. chap. 395. *numb.* 41. *Soc*
Jun. Consil. 14. & 148. *vol.* 2. *nu*
15. *Simo de pratis. de Interpret.*
voluntat. l. 4. *fol.* 226. *Numb.* 4
Swin. part. 7. *sect.* 3. *Numb.* 1. *sect.*
numb. 3. & 6. & *sect.* 14. *numb.* 3. &
Paris. Consil. 10. *l.* 3. *numb.* 4. *No*
Max. p. 97.

32. Also if the Testator ha
made his Will wherein he ha
bequeathed several Legacies to h
own Children, or to his Brother
and afterwards makes another Wi
in favour of other persons; this la
Will shall not revoke this firs
without express words of revocat
on of the first Will, as is shew
before in the first Chapter. *Num*
17. *Mich.* 2. *Car.* 1. *Eyres and Eyr*
Case in Chancery. Cro. 1. *part. Rep*
Swin. part. 1. *sect.* 15. *num.* 5.

34. But in other Wills and T
stamen

taments, the latter doth make void the former; albeit the firſt were a written Will or Teſtament, and the latter but a Nuncupative one, or that there were twenty Witneſſes to the firſt, and but two to the ſecond, and that *ipſo jure*, although there be no mention in the ſecond Teſtament of revoking the former; unleſs there be a Clauſe Derogatory in the former Teſtament: as where the Teſtator ſaith in the firſt, *If I make any Teſtament hereafter, I will that the ſame ſhall be of no force*; then in ſuch Caſe it is moſt ſafe and convenient in the latter Teſtament to revoke the firſt, by ſaying, *I make this laſt Will and Teſtament, Notwithſtanding that Clauſe Derogatory in my former, whereby I would that no Will or Teſtament afterward to be made by me ſhould be of any force.* *Vaſq. de ſucceſſ. Reſoluc. lib. 1. ſect. 1. numb. 26. Paſc. 14. Eliz. Dyer fol. 310. Mich. Graſſ.*

The-

Thesaur. com. opin. sect. Testam. Quæst. 99. *num.* 4, 5. *Swin. part.* 7. *sect.* 12. *num.* 4. 11, 12, 13, 14, 15, 16, 17, 18. *Perk. num.* 478. *Paul. de Cast. Consil.* 206. *Vol.* 1.

35. Also where the Testator hath made two Testaments, a former and a latter, and afterwards lying sick, they are both brought unto him, and being desired to shew which he intends shall stand, and he saith, that the first should be his last Will; or if he take that of the first date, and deliver it for his last Will, then in such Case, that Will shall stand, and the other shall be void. *Perkins num.* 479. *Mich.* 44. *E.* 3. *fol.* 33. *Pacis Consultum, pag.* 81.

36. Likewise if an Executor be named in the first Testament, and none in the second Will, then the first Testament shall stand, and the latter shall be added only by way of Cedicil. *Vigel. Method. Jur. Civilis part.* 4. *lib.* 9. *c.* 32. *in princip.*

Swin.

vin. part. 7. Sect. 14. num. 5.

37. Where it is ſaid before, that here Lands are deviſed, the Will muſt be in writing, and done in the life-time of the Teſtator; yet if the Clerk be skilful in the Law, and takes Notes from the mouth of the Teſtator, for the deviſe of Lands, Tenements and Hereditaments, and afterwards proceeds to write the ſame in form; but before it be finiſhed or ſhewed to the Teſtator, he departs this life; yet this is held and adjudged a good Will in writing, within the Statute of 32 *H.* 8. to convey Lands, Tenements, or Hereditaments. *Mich. 6 E. 6. Sackvil and Browns Caſe, Dyer fol.* 72.

38. Alſo a written Will done in the life-time of the Teſtator, or by Notes as aboveſaid, is good to convey Lands, though it be unſealed or unſubſcribed, nor no Executor named therein: and ſuch a Will which only concerns the bequeathing of Lands, Tenements or Hereditaments,

ditaments ought be proved in [illegible] Chancery. *Hill.* 22. *Car.* 1. *&* [illegible] 23. *Car.* 1. *B. R. Styles Regeſt. Prac*[illegible] *cale*, *p.* 357. *Pacis Conſultum*, *p.* [illegible] *Noy's Maxims p.* 97.

39. If the Teſtator after he ha[illegible] begun his Will, and before he ha[illegible] finiſhed, be ſuddenly ſtricken w[illegible] death or inſanity of mind, or fo[illegible] other impediment, ſo that he ca[illegible] not finiſh the ſame; or, if he ha[illegible] begun the ſame, and deferreth t[illegible] finiſhing thereof till ſome oth[illegible] time, and in the mean time die[illegible] or otherwiſe becometh Inteſta[illegible] In theſe Caſes, though it ſee[illegible] by the Civil Law that ſuch T[illegible] ſtaments are void wholly; yet [illegible] the Law of Nations, and with [illegible] here in *England*, ſuch Teſt[illegible] ments are good for ſo much as [illegible] therein already bequeathed. *M*[illegible] *chael. Graſſ. Theſaur. com. opini*[illegible] *ſect. Teſtament. Queſt.* 12. *&* [illegible] *Maſcha. de Prob. verb. Teſta. Co*[illegible] *cluſ.* 1352. *numb.* 70. *Swin. part.* [illegible]

ſect

n ct. 12. *numb.* 4. 9, & 10. *Pacis Con-*
Pa *pag.* 81. *Simo. de Pratiſ. de*
ra terpret. *ult. voluntat. lib.* 1. *fol.*
p. 95.

40. If there be two Teſtaments
h und, and it cannot be known
ha hich of them was firſt made, nor
w hich was laſt made; in this Caſe
fo ey are both void, unleſs one of
ca em be made in favour of the Te-
ha ator's children, or thoſe who after
t s death, are of right to have Ad-
th iniſtration of his Goods, if he had
e ed Inteſtate; and the other Te-
a ament made in favor of Strangers;
e nd then in ſuch Caſe the Teſta-
T ent made in favour of the Chil-
ren or Friends, &c. ſhall prevail
nd ſtand good, as is ſhewed before
the firſt Chapter. *Num.* 17.
ranc. *Mantica de conject. ult. vo-*
unt. *l.* 2. *Tit.* 15. *num.* 17. *Swin. part.*
ect. 15. *num.* 2. & *part.* 7. *ſect.* 11.
um. 2.

41. Or, if one of the Teſtaments
e made *Ad pias cauſas*, and the
other

other not, then the Testament *pias causas* shall prevail, unless other be *inter liberos* amongst Testator's Children, and then shall prevail, and not the Testament *ad pias causas*, as is shewed before in the first Chapter, *Nu* 18. *Francis. Mantica de conjectura v. lunt. l. 6. Tit. 3. num. 43. Swin. pa* 1. *sect.* 16. *num.* 7. *& part.* 7. *sect.* *num.* 6.

42. Also where there are two Testaments, and one of them is proved before the Ordinary, *&c.* a the Executors are entred to the possession of the Goods, and then t other Testament is found, and cannot be known which was fi made, nor which was last mad in this Case the Testament alrea proved shall stand, and the Executors shall not be dispossessed of t Goods, by means of the other Testament of the same date. *Sich in D. lib. ult. Swin. part.* 7. *sect.* *num.* 4.

43

43. If a man be so extream sick, at he is almost at the point of ath, and can scarce speak; yet if be of good understanding and und mind, as may appear by his estures and sensible Speeches; in ch Case he may make his Testa- ent; so as it come of his own ac- unt, and not at the earnest request importunity of his wife, or some ovetous person who expects and is eedy after benefit by the same. *ranc. Mantica de conject. ult. volunt.* 2. *Tit.* 6. *num.* 5, 9. & 10. *Socin. Jun. onsil.* 183. *vol.* 2. *num.* 27, 31, 34, & 9. *Mic.* 1654. *B. R. Hatcher and New- rns Case. Styl. Regist. Practicale. p.* 59. *Swin. part.* 2. *sect.* 25. *num.* 2. 5, 6, & 7. *Simo. de Pratis. de Interp. ult. vo- unt. l.* 2. *Dub. ult. Soluc.* 4.

44. If the friends of such a sick man, or any other persons, do with- out his knowledge prepare a Will n writing, and bring it to him, nd read it, and ask him if that hall stand for his Testament, and he

he anſwers, *Yea*, and immediat
after dieth; in this Caſe ſuch T
ſtament is not good, unleſs the T
ſtator had firſt uttered his mind
the Writer or Inditer thereof,
had requeſted them to write
Will; or unleſs the Teſtator,
ing of perfect mind and memor
had by plain and expreſs words,
other apparent conjectures, conſi
med the ſame, and not only by a
ſwering, *Yea*. *Franc. Mantica de c
ject. ult. volunt. l. 2. Tit. 6. num.
Swin. part. 2. ſect. 25. num. 11. Ga
l. 4. commun. concluſ. Tit. de Teſt. c
cluſ. 2. num. 13. & 17.*

45. If a man through juſt fe
and conſtraint of ſome other perſo
do make a Teſtament, ſuch a Teſta
ment is void, eſpecially when afte
wards the Teſtator declareth, *Th
he would gladly alter his Teſtamen
but for fear of ſuch a perſon*; an
then ſuch a Teſtament is void,
leaſt, as to ſuch a perſon by hi
named, of whom he is afrai

Mich

Gross. Thesaur. con. opin. sect. Testament. Quest. 23. num. Swin. part. 7. 2. numb. 1. & 10.

46. But here it is left to the discretion of the Judge, who ought not only to consider the quality of the threatning, but also the persons well threatned as threatning; and in the persons threatned, the Sex, the Age, or Courage, or Pusillanimity; and in the person threatning, the power, the disposition, and whether he be a meer Boaster, or Performer of his threats. *Menoch. Arbit. Judic. Casu* 135. *Maschar. Probat. Conclus.* 1054. *Swin. part* 7. *sect.* 2. *numb.* 7.

47 Also a Testament made by fraud is void, unless the deceit of fraud be very small, such as would not deceive any rational man or woman, or that the fraud be not Evil, as where the Testator, intending to bestow all his goods on some vile person, omitting his honest Wife and Children; here

here if the wife and Children perſwade him that ſuch a perſon dead, or by ſome means decei the Teſtator, and procure the ſelves to be made Executors, t this is not to be repelled as an lawful Teſtament. *Bald. in. lib. 1. numb. 17. Swin. part. 7. Sect. num. 2.*

48. Though a man have ſworn to make a Teſtament, yet notwi ſtanding he may lawfully ma one; and if he have made one, a ſworn not to revoke it, yet he m afterwards make another, and voke the firſt: but then it is co venient, that he revoke his Oath ſo, and ſay, I make this my laſt W and Teſtament, notwithſtanding former Teſtament, with the O therein contained not to revoke ſame. *Mich. Graſſ. Theſaur. com. op ſect. Teſtam. Queſtio 87. Ful. Clar. ſe Teſtament. Queſtio 94. Swin. part. ſect. 24.*

49. It is neceſſary to the va

lity of a Testament, that the Testator have ability to make a Testament, not only at the time of the making thereof, when the Testament receiveth his essence or being; but also at the time of the Testators death, when the Testament recieveth his strength and confirmation: And therefore if a woman make her Testament, and then marry, and die during marriage, such Testament is void, or if she make a Testament during marriage, and over-live her husband, and then die, yet the Testament is void: but if she make her Testament before marriage, and overlive her Husband, and then die in such case the Testament is good; or, if it were made during marriage, and after her Husbands death, she doth approve and confirm the same, and then die, in such Case also it is held to be good. *Plo. Com. fol.* 343. 37. *Eliz. C. B. Forse & Hemlings Case, Co.* 4. *lib.*

lib. Rep. fol. 60. Swin. part. 2. sect. num. 4, 5, 6.

50. A Codicil may be added Parol to a Will in writing, and t Parol Codicil shall be put in wr ting, and affixed to the Will a Codicil; and this may as well done, as a Will in writing may revoked by Parol. *Hill*, 22 C 1. *& Pasch.* 23 *Car.* 1. *in B. R. St Regist. Practicale. p.* 357. *& Pas* 14 *Eliz. Eyer fol.* 310.

51. If the Testator make Will by Parol, which is afterwa put by another into writing, and put more in than the Testator express; yet it is good, as to much as can be proved was expr sed by the Testator by Parol, a the rest is void. *Pasch.* 24 *Car.* B. R. *Styles Regist. Practicale.* 357.

52. One went beyond Sea, a wrote back a Letter that his La should go in such a manner, and was adjudged to be a good W

Deviſe of his Land. *Abr. Moors* p. 63. *pl.* 299. *Weſts Caſe.*

53. If the Teſtator being of ſane mory, deſire another perſon to his Hand and Seal to his Will Him, and he does ſo; this is a od Will, though the Teſtator it not himſelf. *Paſch.* 1650. *R. Styles Regiſt. Practicale* p. 8.

54. If a Parol Will be put in wri- g, and is afterwards embezeled, or deſtroyed; yet the Will is thereby deſtroyed, if it can be ved by Witneſſes; but if it come queſtion, whether a Will be od or not, in ſuch Caſe proof h not avail; for matter of Law o be decided by the Judges, and by Witneſſes nor Juries. *Ad eſtionem Facti non reſpondent Ju- es: Ad queſtionem Juris non re- ndent Juratores. Hill.* 22 *Car.* 1. *ch.* 24. *Car.* 1. *B. R. Styles Re- . pract. p.* 357, 358. *Cowel on Lit.* 155. *b.*

55. If a Testament bear date *Cane* in *Normandy*, and be pro in *England*, it is good enough the Executor to bring an A upon. *Perkins, numb.* 494.

56. Note, that a man may partly Testate and partly Intest by the Laws of this Realm, tho it is contrary to the Civil Law: this he may do, not only in res of time, but also in respect of go and place: for, if a man have go in divers Dioceses, he may m Executors of his goods in one ocese, and die Intestate as touch his goods in another Diocese; a man make one Executor, parti larly of a certain portion of goods, the Executor is only so chargeable with the paiment of Debts and Legacies of the Te tors, as the portion of the good him allotted do extend unto; as touching the residue of the stators goods, if there be not a ther Executor appointed, then

h goods he is said to die Intee, and Administration may be ken of them. *Bro. Executor. numb.* & 154. *F. N. B. numb.* 26. *cod. . Plo. Co. fol. In Fox and Griesbies se. Swin. part.* 4. *sect.* 18. *numb.* 4.

CHAP. III.

Who may make a Testament, and o not.

EVery person, both man and woman, Christian and Jew, nd or sick, and generally of what tate or Condition soever he or be of, hath full power and liberty to make a Testament, or last ill, and may therein dispose of eir Goods and Chattels; saving h persons as be prohibited by w or Custom, as hereafter folweth. *Mich. Graſs. Theſaur. com o. ſect. Teſtam. Quæſt.* 20. *numb.* 1. *in. part.* 2. *ſect.* 1. *numb.* 1. 58. By the Stat. 34 *H.* 8. Wills Testaments made by any person thin the Age of twenty one years

of any Mannors, Lands, Tenem
or other Hereditaments, is not g
nor effectual in the Law, for
that Age, by the Common L
of this Realm, they are accoun
Infants. 34, 35 *H.* 8. *c.* 5. *Wing*
Abr. Stat. Tit. Will. numb. 22. *Dr.*
Stud. l. 1. *c.* 11. *& l.* 2. *c.* 28. *S*
pant. 2. *sect.* 2. *num.* 1.

59. But a Boy of fourteen,
a Girl at twelve years of Age,
the Civil Law, may make
Wills and Testaments of t
Goods and Chattels; and that
only without the authority or c
sent of their Curator or Guardi
but without the authority
consent of their Parents,
though it be made but in the v
last day of fourteen or twelve ye
yet it is good enough; but bef
that age it is not good, althou
the Boy were a Souldier, or t
the Testament were made *ad*
causas, or with consent or author
of the Tutor. *Mich. Graß.*

ur. com. opinion. sect. Testament. Quæstio 20. Perkins, numb. 503. owels Instit. p. 122. Swinbor, part. 2. ct. 1. num. 6, 7, 8. Noyes Max. 97.

60. Mad folks and lunatick persons, during the time of their *Furor* or infanity of mind, cannot make a Testament, nor dispose any thing by Will, no not *ad pias causas*; nay, though they come to their perfect understanding afterwards; yet this doth not make the Testament to take any effect, which was made during such *Furor*: but if these mad or lunatick persons have cleer or calm intermissions, then during such time they may make their Testament, and appoint Executors, and dispose of their Goods at their pleasure; and the *Furor* going before the making of such Testament shall not prejudice it. *Reformat. Leg. Ecclesiastic. Tit. de Testament. cap. 7. Pacis consultum p. 80.*

Mich. Graß. Thesaur. com. opin. sc. Testam. Quaest.-2. 17. Swin. p. 2. sect. 3.

61. Also if a man of sound memory, who was never taken with any Lunacy or Insanity of mind, do make his Testament of his Goods or Lands, and afterwards is taken with Lunacy or Insanity of mind, a little before his death, (which often happens through the extremity of their sickness) yet this doth not hurt the Testament which was made before; or if a lunatick person, or one that is besides himself sometimes, make his Testament, and it is not known whether the same were made when he was of sound mind or no; in this Case, if no Argument of Frenzy or Folly appear in the same, then it shall be conceived to be made in his calm Fit, and so adjudged a good Testament. But on the contrary, if any Folly appear in the same, though it be but two or three words,

rords, as if he say, *I Peter*, when is name is *John*; then it makes he Testament void, as being presumed to be made during the insanity of mind. *Mich. Graß. Thesaur. om. opin sect. Testam. Quæst. 21. Vasq. e succes. progres. lib. 1. sect. 1. num.* 0. See *Co. 4. lib. 1. Rep. fol. 61. w.n. part. 2. sect. 3. num. 4.* 14, 15.

62. Note, that every person is resumed to be of sound mind, unless the contrary be proved; and herefore those that intend to make void a Testament by reason of insanity of mind, must prove the ame impediment; and if it be proved that the Testator was beside himself before the making of the Testament, although they do not prove him to be mad at the very ime of making the Testament, yet it is sufficient, and it lies on the Executors part to prove that the Testator was of sound mind, not only to answer to ordinary and un-

ſual queſtions, but that he had
diſpoſing memory, and was able
make his Deviſes and Beque
with underſtanding and reaſon,
the time of making his Teſtamen
Franciſc. Mantica de conject.
volunt. l. 4. Tit. 5. Maſchard. de Pr
bat. verb. Furioſum, Concluſ. 82
numb. 10. Vide 41 Eliz. B. R.
Marqueſs de Wincheſter's Ca. Co.
Li. fo. 23. Swin. part. 2. Sect. 3. Nu
6, 7.

63. An Idiot or Natural Fo
that cannot number Twenty, n
tell his Age, nor is able to anſw
to any ordinary and uſual Queſtio
nor knows what is for his adva
tage or damage, though it be not
rious, nor is apt to be inſtruct
or informed by any other; ſuc
an one cannot make a Teſtamen
nor may diſpoſe either of his Lan
or Goods. *F. N. B. de Idiota inqu*
rendo. 34 H. 8. ca. 5. Cowels In
p. 123. Simo de Pratiſ. de I
terp. ult. volunt. lib. 2. dub.

fol. 4. *Swin. part.* 2. *sect.* 4. *num.* 1, 2.

64. But if a man be of a mean understanding, between a Wise-man and a Fool, such an one may make his Testament; unless he be so simple as that one may perswade him to believe things impossible, as that an Ass can fly, or that in old time Trees did walk, and Birds speak, or the like. *Simo. de pratis. de Interp. ult. volunt. lib.* 2. *dub.* 1. *fol.* 4. *Swin. part.* 2. *sect.* 4. *num.* 3, 4.

65. A married woman cannot make her Testament of any Manors, Lands, Tenements or Hereditaments, by the Statute of 34 *H.* 8. neither can she make a Testament of Goods or Chattels without her Husbands license, except she be a Queen or Empress, or that she were Executrix to some other person: for in such case she may make her Will of such Goods as she hath as Executrix, without his license; and name her Executor, who shall have them to the use of the first

Testator.

Teſtator; but ſhe cannot give them away as a Legacie; and if ſhe die without Will, yet in ſuch caſe ſuch goods as ſhe had as Executrix (of which the property is not altered) ſhall not go to the Husband, but Adminiſtration thereof ſhall be committed to the next of kin of the firſt Teſtator. But in both theſe caſes, the Husband ſhall have the Profits ariſing of the ſame, as Calves, Lambs, and ſuch-like profit of Kine and Sheep. Alſo, if the Wife have Goods by way of Legacie from another perſon, in ſuch caſe ſhe cannot make a Teſtament, or diſpoſe of the ſame, without his Licence. Note, though the Husband do give Licence to the Wife to give away part of his goods, yet notwithſtanding he may countermand her Teſtament again, either before or after her death, or, at leaſt before the Probate thereof. But if the wife make her Teſtament of his Goods, and the Executors prove

the

ſame, and the Husband deli-
s the goods to the Executors;
n he cannot countermand the
ſtament, though the wife made
without his licence or know-
ge: for by this after-act the Law
ſumes he gave conſent at the
ſt. 34, 35 *H.* 8. *c.* 5. *Bract. l.* 2. *c.*
. *Bro. Deviſe* 34. *Teſtament* 21,
ecutor 11. *& Adminiſtrator* 45.
rkins numb. 501. *&* 502. *Noyes*
xims p. 97. *Mich.* 2 *E.* 2. *Deviſe*
. *F. N. B. tit. Executor. num.* 10.
in part. 2. *ſect.* 9. *Plo. com. fol.*
5. *Cowels Inſt. p.* 124.

66. A Slave or Bondman cannot
ake a Teſtament or Will, for that
he hath is his Lords, and he can
ſpoſe of nothing. *Bract. l.* 1, *c.* 9.
m. 3. *Fleta l.* 1. *c.* 5. *ſect.* 7. *num.* 3. *&*
wels Inſt. p. 16.

67. But if a Villain make a Te-
ament, it is not abſolutely void,
t voidable: for, if the Lord en-
r, and ſeiſe the Villains Lands
d Goods before Probate of the
Will,

Will, it makes the Deviſe vo
or if he claim the Villain, in
life-time, and ſeize the Goods
word only, it makes the De
void. But if neither of theſe
done by the Lord, before the E
cutors prove the Will and
the goods, then the Teſtamen
the Villain is good in law ag
the Lord; except it be in caſe
the King; for if his Villain
or ſell his goods, the King
ſeize them at any time; for,
lum tempus occurrit Regi. Alſo
Villain have Goods as Executo
another perſon, he may ma
Teſtament thereof, and appoi
Executor to the firſt Teſtator,
ſhall have the ſaid Goods, and
the Lord of the Villain. *Bro tit.*
lenage 50, 68, 73. *Dr. & Stud. l. 2.*
Littleton's Tenures, l. 2. c. 11.
part 2. ſect. 7.

68. A man that is taken cap
by thoſe who are open enimie
the King, cannot make a Teſtam
du

ring his captivity: for if he do, ough he ſhould eſcape afterards, and then die, yet ſuch Teſtaent is void: but if he had made a eſtament before he was taken, and en afterwards eſcape; or, though e die during his captivity, yet in oth Caſes the Teſtament is good; nd ſo it is if he be taken by thoſe ho are not proclaimed enemies, nd during his captivity he makes is Teſtament; or, if a man who is mpriſoned for Debt, do make his eſtament during his Impriſonment, it is good, unleſs it be made in avour of thoſe at whoſe Suit he impriſoned. *Mich Graſſ. Theſaur. m. opin. ſect. Teſtament. Queſtio 5. Franciſc. Mantica de conject. ult. olunt l. b. 2. tit. 7. num. 2. & Bract. 2 cap. 16. numb. 5. Swinborn. part 2. ct. 8.*

69. One that is born deaf and umb if it appear by ſufficient Argument that he underſtands what

what a Teſtament is, may by ſig
make a Teſtament, and ſo may a
one that could have ſpoken a
heard formerly, and is becom
deaf and dumb by ſome accident
or, if ſuch perſon can write, then
may write his Tenement with
own hand; and ſo likewiſe m
one do that can hear, but cann
ſpeak: and if he cannot write
then he may do it by ſigns and t
kens: and one that can ſpeak
but cannot hear, may alſo ma
his Tenement, and deviſe his goo
to whom he pleaſes. *Refor. Leg. E*
cleſ. tit. de Teſtam. c. 7. Swin. part.
ſect. 10.

70. But one that is born bo
deaf, dumb and blinde, cannot ma
a Teſtament or Will, becauſe
hath no underſtanding. *Finche*
law, lib. 2. cap. 2. pag. 103. *Perkin*
num. 25.

71. One that is blind, may ma
a Nuncupative Teſtament, by d
claring his Will before a ſufficie
nu

mber of Witnesses; but he can-
t make his Testament in writing,
less the same be read before
Witnesses, and then acknowledged
him to be his last Will and Te-
ament: for if he should acknow-
dg a Writing for his last Will,
d do not hear it read, this will
t make it amount to a Will in
riting. *Swin. part.* 2. *sect.* 11 &
m. 1, 2.

72. He that is lawfully convict-
of High-Treason, by Verdict,
onfession, Outlawry or Present-
ent, cannot make his Testament,
dispose of any Goods, Lands, Te-
ements or Hereditaments; nay,
ough he have made a Testament
fore such conviction, yet the same
void: but if he afterwards ob-
in the King's Pardon, then he
ay make a Testament; or, if he
ve made one before conviction,
en after such pardon the same be-
mes good again. *Cowel's Inst. p.*
3. 5 *E.* 6. *c.* 11. *Swin. part.* 2. *sect.* 12.

73.

73. He who is indicted of ...ist, lony at the Kings suit, and will ...ent plead to the Indictment, but ...he Mute, shall be pressed to death, ...me forfeits all his Goods, but not ...omp Lands; and so it is said he may ... is such case make his Testament ...nd his Lands. *Swin. part.* 2. *sect.* 13. ...ur. 5. *Dr. & Stud. l.* 2. *c.*41. *Fulton de ...to ce Regis, f.* 216. ...ro.

74. Those who are indicted ... 13, lawfully convicted of such Cri... 92. as are Felony, (as petty Trea... 29. Murder, Homicide, Chance-me... 23. Burglary, Robbery, Theft, Bug... *vid* ry, Rape, *&c.*) after their c... *feit* viction can make no Testame... *into* nor dispose of any Lands, Goo... *Fel* or Chattels of their own; nay, ... B they have made a Testament ... 42. fore, such conviction makes ... void, unless they procure the Kin... *ret* Pardon, and be restored to th... (first condition again; but, if one ... *an* attainted of Felony only, he m... *ve* give away his Goods by Deed ... *he*

Gi...

ſiſt, or ſell them, before Judgment be pronounced; but for Lands, he Law takes notice from the me of the Fact committed and ompriſed in the Indictment; but is otherwiſe in caſe of Goods nd Chattels. *Mich. Graſſ. Theaur. com. opin. ſect. Teſtament. Quæſtio 26. Dr. & Stud. lib. 2. c. 41. Bro. Forfeiture, 5. 28, 65, 89, 103, 113, 117. Swin. part. 2. ſect. 13. Stamf. 192. 33 E. 3. tit. 20. Perkins num. 499. 41. Aſſ. pl. 31. Cowells Inſt. p. 323. & 124. Dalton fol. 292. ca. 110. Vide Co. on Lit. ſect. 745. Raſtal. Forfeiture 7. Wingate Abridg. ſtat. eod. titulo. num. 5. & 8. Stat. de catallis Felonum. & 1 Ric. 3. cap. 3. Paſc. 8 E. 4. fo. 4. a. Kitch. Court-leet f. 42. a.*

75. By our ancient Law, an Heretick could not make a Teſtament (after conviction) of his Goods and Chattels; and if he were delivered over to Lay-mens hands, then he forfeits his Lands alſo. But ſee

now

now the Statute of 1 *Eliz. c.* 1. f
by that Statute 2 *H.* 5. *c.* 7. whi
gave forfeiture of goods and lan
in case of heresie, stands now r
pealed; so that we have nothing
certain now, but what we recei
from the Canon-law. A Relap
into Heresie after Recantation is f
tal. *Mich. Graff. Thesaur. com. opi
sect. Testam. Quast.* 24. *Cowels Inst.*
124. *Swinbor. part.* 2. *sect.* 14. *Dr.*
Stud. l. 29. 2 *H.* 5. *c.* 7. 1 *Eliz. c.*
Co. 3. *part. Inst. fol.* 43. *c. Heresie. Re
formatio Leg. Ecclesiasticum, tit. de Tes
c.* 7.

76. He who hath been condemned, or publickly confessed himself to be a manifest Usurer, and publickly uses the same Trade, and hath exacted above ten pounds in the Hundred, for the loan or forbearance of an hundred pounds for one year, cannot make a Testament of his Goods and Chattels, unless he satisfie or make restitution for the same in his life-time, or enter caution

caution for satisfaction to be made after his death. *Menoch de Arbit. Judic. l. 2. casus 235. Swin. part. 2. sect. 6. Fleta l. 2. c. 50. Cowels instit. pag. 124. Mich. Grass. thesaur. com. opin. sect. Testament. quæst. 33. 13 Eliz. cap. 8. Refor. Leg. Eccles. tit. de Testamentis, c. 7.*

77. If one make a Testament of his goods or chattels, and afterwards wittingly and willingly kill or hang himself, then such Testament is void; for his goods and chattels real and personal are all forfeited to the King, and all debts due to him by Specialty, but no debts due to him without Specialty, or upon simple Contract. *Stamf. pl. Corona l. 1. ca. 3. Bract. l. 3. c 2. Cowels Inst. p. 124. Swin part. 2. sect. 20. Co. 3. part. Instit. fo. 54. 3 E. 3. Coron. 301. 8 E. 2. Coron. 420. Pasc. 8 E. 4. fo. 4. a Dier. fo. 262. Daltons Just. fo. 236. cap 92.*

78. If one who is outlawed in a personal Action, make his Testament

ment of his Goods, and the Executors prove the Testament, and afterwards sue the Debtors of the Testator, who plead Outlawry of the Testator as a Bar; this hath been held as no good Bar, so that before seisure they may sue: but if the King seize the goods as forfeited, though he give them back again to the Executors, yet they shall not be Assets in their hands to charge them with any debts or Legacies of the Testators. *Trin. 3 Eliz. C. B. Rot.* 1306. *Woolly and Bradwell's case. Brownlow's* 1. *part Rep. fo.* 55. *M. ch.* 20 *Jacob. C. Bullen and Gervise case. Hutton's Rep. fol.* 53. *Dr. & Stud. lib.* 1 *cap.* 6.

79. He who is so excessively overcome with drink, as that he is utterly deprived of the use of Reason and Understanding, at such time cannot make a Testament: but if he be not clean spent, albeit his Understanding be a little darkned and ob-

secured, and his Memory troubled, he may make his Testament in that case. *Simo. de Prat. de Interp. ult. Hunt. l. 2. dubium 1. solut. 4. num. 22. Swin. part. 2. sect. 6.*

80. Archbishops, Bishops, Deans, Archdeacons, Prebendaries, Parsons, Vicars, and other Ecclesiastical Ministers or Clergy-men, may make their Testaments of all such goods and chattels as they severally enjoy in their own Right, and not in the right of their Churches and Ecclesiastical Livings. *Perkins num. 496, 497, 498, 28 H. 8. c. 11. Mich. Graf. Rel. com. opin. sect. Testam. quæst. 34. Cowel's Inst. p. 125. Swin. part. 2. sect. 6. Dr. & Stud. l. 2. c. 39.*

81. The King, however in a capacity to make a Will, cannot make a Testament, and thereby give away his Kingdom and Crown-Jewels or *Regalia*, from his lawful Heirs to another. *Fitz. Abr. Devise 5. Ex. 108. Cowels Inst. p. 125. Swin. part. 2. sect. 27.*

82.

82. The Queen of *England* is exempt person from the King, may make a Testament; and is ability and capacity to grant and take, to sue and be sued, as a *sole* by the Common Law. *Co. on fo.* 134 *sect.* 200. *Finches law, l.* 2. 86. *Co.* 4. *lib. fo.* 23. *in Clark Pennyfathers Case.*

83. When one is grown so as that he is become a Child ag in his understanding, and is dep ved not only of Reason, but also Sense almost; or, grown so forg ful (through Age or other infirm ty) that he hath forgotten his o name; such person can no mo make a Testament than a Chi *Franc. Mantica de Conject. ult. volu l.* 2. *tit.* 15. *num.* 16. *Simo. de Pretis interp. ult. volunt. l.* 2. *dub.* 1. *fol. numb.* 22. *Swin. part.* 2. *sect.* 5.

84. An Excommunicate pers may make his Testament; unless be excommunicate for Heresie manifest Usury, or some other ca

for the which he is prohibited to make a Testament; or unless he be excommunicate with that great Curse which is called *Anathema*, and is not inflicted but upon great cause. *Swin. part.* 2. *sect.* 22. *Mich. Graff. Thesaur. com. opin. sect. Testam. quæst.* 24.

85. By the Civil Law, such as marry within the Levitical degrees, and prohibited to marry by God's Law, cannot make a Testament, or dispose of any goods or chattels to their children begotten in such incestuous Marriage; unless it be so much only as will serve for their competent sustentation or maintenance; or that they be appointed but bare Executors, without any other benefit: or, if the Parents were ignorant of the impediment of such Consanguinity or Affinity, then the children born during such ignorance by the Ecclesiastical Canons are capable of all Legacies, and all manner of Testa-

mentary benefits, as legitimate, beit the parents afterwards shou be divorced: Observe also, that the incestuous persons aforesa cannot make a Testament, or d pose of any goods to their incest ous children: so neither can th devise their goods to any oth except it be to their parents, or b ther, or sister, or uncle, or au or to such children as were beg ten in lawful Marriage by a form wife, if they had any.

86. Several other persons th are who fall under Ecclesiasti Censures, and are prohibited that Law to make a Testamen but being that they are not dep ved of this privileedge by our Co mon or Statute-Laws (which lim the power of the Ecclesiasti Courts within this Kingdom) I sh omit therefore to mention the and to conclude this Chapter.

CH

CHAP. IV.

Who may be an Executor, and who not.

87. NOte, that every person may be an Executor, and is capable of a Legacie; saving such persons as are prohibited by Law: as, in some cases those who cannot make a Testament or Will, may be Executors; as, a child in the Mothers womb, an Infant, a married woman, a Bondman or Villain; and in such case the Villain may have an Action against his own Lord, if he were indebted to the Testator. *Lit. l. 2. c. 11. Bro. Abr. tit. Villenage 68. & tit. Executor. Swells Inst. p. 129. Glan. l. 7. c. 6. Old Tenures, tit. Villenage. Fra. Manera de com. nlt. Volunt. l. 4. tit. 8. Swin. part. 5. sect. 1.*

88. And if the Testator make his

own Villain Executor, he d
thereby manumit and free h
from Bondage. *Cowels Inst. p.*
Bract. l. 4. c. 21. Co. on Lit. fo.

89. Note, that if he who is
med Executor be an *Apostata*, o
Heretick, either at the time of
making the Testament, or at
time of the death of the Testat
or at the time when he wo
undertake the Executorship,
these Cases he is to be exclu
by the Civil Law. *Sichard.*
Rubr. de Hered. Instit. C. num.
Mich. Graff. Thesaur. com.
sect. Inst. quæst. 28. Swin. pa
sect. 2, 3.

90. He who is convicted of T
son or Felony, is incapable of
Executorship or Legacie: but, i
were attainted of Felony, and
terwards admitted to his Cler
then he may be an Executor,
Mich. Graff. Thesaur. com.
sect. Instit. quest. 5. Labrig. des
ses edit. anno Dom. 1599. fo.

num. 13. *Swin. part.* 5. *ſect.* 4, 91. An Outlawed perſon, ſo long he ſtandeth in that caſe, is not to be admitted to the Executorſhip, or can ſue for his Legacie: but though the Ordinary do nor admit him, yet if he ſhall Adminiſter as Executor, becauſe it is to the uſe of another, it is held to be good in Law. But if the Teſtator bequeath the reſidue of his goods, or ſome Legacie, to the Executor, being an outlawed perſon, the ſame is forfeited and confiſcate by force of the outlawry. *Dr. & Stud. l.* 1. *c.* 6. *& l.* 2. *c.* 3. *Labrig. des Cas edit. Anno Domini* 1599. *tit. Execut. fol.* 179. *Swinborn. part* 5. *ſect.* 5.

92. An unlawful College (that is, ſuch Companies, Societies, Fraternities, and other Aſſemblies whatſoever, not confirmed nor allowed by Authority for a lawfull Corporation) cannot be Executor. See afterwards *num.* 99. *Perkins ſect.*

505. & 510. 9H 6. fo. 23. Swin. p
5. sect. 9.

93. Libellers, manifest Usurer
Sodomites, and other crimino
persons, who are forbidden to ma
a Testament, can receive no bene
by the last Will or Testament
another person: for it is a comm
received Conclusion, That he th
cannot make a Testament or l
Will, by reason of some Crime
him committed, the same person
incapable of any Legacie of goo
disposed by the last Will or Test
ment of another. *Jul. Clar.* se
Testament. quæst. 43. *num.* 2. *V*
de succes. progress. l. 1. *sect.*
num. 18. *Swin. part.* 5. *sect.* 1
11. *Reformat. leg. Eccles. tit. de T*
cap. 14.

94. A Recusant convicted at t
time of the Testator's death, or
the time of granting Administrat
on, cannot be Executor nor Adm
nistrator. *Wingate Abr. Stat.*
Crown, num. 134, 141.

95.

95. If the Testator intending to make *John at Style* Executor, say, make *John at Noke* my Executor, in this case neither of them is to be Executor: for *John at Style* is excluded, because the Testator never spoke it; and *John at Noke* is excluded, because the Testator never thought it. *Swin. part.* 7. *sect.* 3. *num.* 2.

96. Or, if the Testator say, I make my Cousin *John at Style* my Executor; if *John at Style* be not his Cousin he cannot be Executor, unless the Testator were wont commonly to call him Cousin. *Rich. Graß. Thesaur. com. opin. sect. Inst. quæstio* 9. *num.* 4. *Swin. part* 7. *sect.* 3. *num.* 4.

97. Also if the Testator say, I make *John at Style* my Executor and there is two of that name, neither of them shall be admitted; unless one of them were of the Testators familiar acquaintance, or his Kinsman, and the other

a ſtranger; for in ſuch caſe t
ſtranger ſhall be excluded, and t
other admitted. *Simo de Pract.*
Interp. ult. Volun. l. 1, *fo.* 97. *nu*
1, 3. *&* 100. *Franc. Mantic.*
conject. ult. Volunt. l. 8. *tit.* 4. *nu*
5. *Swin. part* 7. *ſect.* 8.

98. And if both of them be
the Teſtators acquaintance, or bo
of them Kinſmen; then he whi
is of the greater acquaintance,
nearer of Kin ſhall be admitted
and the other excluded: and
ſuch caſe, he ſhall be adjudged
be neareſt of kin, to whom Adm
niſtration ſhould have been com
mitted if the Teſtator had died I
teſtate. *Franc. Mantica de conje*
ult. Volunt. l. 4. *tit.* 6. *num.* 3, 4. *Si*
mo. de Pract. de Interp. ult. Volu
l. 1. *fo.* 96. *num.* 9. *Swin. part.*
ſect. 8. *num.* 3, 4.

99. If the Teſtator make th
poor his Executors, giving the
the reſidue of his goods, this di
poſition is not void by reaſon of i
certainty

certainty, because it is a Testament *ad pias causas*. By the Poor therefore, is understood the Poor of the Parish where the Testator did dwell and keep house; and the Ordinary is to take care that the Poor have their due, according to the meaning of the Testator. Also, if the Testator bequeath any goods or money to the Parishioners of any Parish, to the use of the Church, such a Bequest is good, and the Legacie may be recovered by the Churchwardens, who albeit in every respect they be not a lawful Corporation, yet in this respect, in favour of the Church, they are accounted a lawful Corporation; and where it is said that unlawful Colleges or Companies, *&c.* (not incorporated by the Kings Authority) cannot be Executors; yet in such case, if the several and particular persons, by name of an unlawful College, *&c.* be appointed Executors, they are not to be re-

pelled. *Franc. Mantica de conjec. ult. volunt. l. 8. tit. 5. num.* *Tiraquel. tract. de privileg.* *causa privileg. 56. Lambert. Tr.* *de Officio Gardianarum, fo. 43.* *tit. Corporation, num. 55. 73,* *84. Fulb. l. 1. fo. 42, 43. Swin. p.* *7. sect. 8.*

100. If the Testator make h own Kin his Executors, in] this c those of Kin who are neareſt him, and should have had the A miniſtration if the Testator had ed Inteſtate, shall be first admitte and enjoy the Executorship dur their lives; and after their deat then the other next of Kin to t Testator is to be admitted ſucce ſively one after another, and n all together: but if the Tes tor make another mans Kindred h Executors, in ſuch caſe they are to be admitted together to the E cutorſhip. *Simo. de Prat. de Inte ult. Volunt. l. 3. fo. 91. nu* 28. *Mich. Graſſ. Theſaur.*

quin. sect. Inst. quest. 20. sect. Fidei commiss. quest. 16. & sect. legat. quest. 43. Swin. part. 7. sect. 8. num. 10.

101. Where the Testator makes the next of his Kin his Executor, and dies without issue of his body; in this case the father or mother, if living, shall have the Executorship, as next of kin to their son; contrary to the Judgment given in the 5 E. 6. in the Duke of *Suffolks* Case, which Case is now over-ruled, and not held for Law. *Co. 3. lib. fo. 40. in Ratcliff's Case there. Gowels Inst. p. 40. Trin. 22 Car. 1. B. R. Styles Registrum Practicale, p. 21. Swin. part. 7. sect. 8. in fine.*

102. If the Testator say, I make *A.* or *B.* my Executors; in this case it is all one as if he had said, I make *A.* and *B.* my Executors; unless it be where the Testator bears more affection to the one then to the other; and then he which he bears most affection to, shall be preferred; as, where the

Testator

Testator makes his brother or *John at Style* his Executors; in this case the brother shall be first admitted, and after his death, then *John at Style* (if he be living) shall be admitted. Also, where one of the persons so named is incapable, then the disjunctive standeth properly, and the other shall be admitted alone to the Executorship. *Jul. Clar. sect. Testam. Quest.* 80. *num.* 5. *Swin. part* 7. *sect.* 9.

103. An Excommunicate person, so long as he standeth in the Sentence of Excommunication, is not to be admitted to an Executorship by the Ordinary; nor can he commence any Suit there for his Legacie. *Michael Graß. thesaur. com. opin. sect. Inst. Quæst.* 4. *Swin. part* 5. *sect.* 6.

104. Bastards, begotten and born in Adultery or Incest, are not capable of any benefit by the Testament or last Will of their Incestuous or Adulterous Parents; except

ept there be only ſo much be-
ueathed, as will ſuffice for their
ompetent Alimentation or Relief,
hat is to ſay, for their Food, Clo-
hing, Lodging, and other meet
nd convenient neceſſaries, accor-
ing to the degree and ability of
heir Parents; or, that it be in
aſe of Lands, Tenements, and
Hereditaments; for there a man
nay by his Teſtament or Will in
Writing deviſe to his Baſtard all
is Lands, Tenements, or Heredi-
aments; and ſuch Baſtard may ſue
or the ſame and recover them:
nd ſo it was adjudged in the La-
ly *Griffin's* caſe, upon the Te-
ament of Sir *Francis Wortley*,
who deviſed all his Lands to his
aſe Daughter. *Mich.* 18 *Car.* 2.
*B. R. Mich. Graſſ. Theſaur. com. o-
in. ſect. Inſtit. Quaſt.* 7. *Gabr.
om. Concluſ. lib.* 6. *tit. de Ali-
ent. concluſio* 1. *num.* 5. *&* 31.
Menoch. preſumpt. lib. 4. *preſum-
tio* 157. *num.* 3. 32 *H.* 8. *cap.* 1.

Brac.

Brac. l. 2. c. 7. Swin. part. 2. sect. 17. part. 3. sect. 7.

105. Note also, that these incestuous or Adulterous Bastards may be Executor to any other person, serving to their natural parents, and are capable of a Legacie bequeathed to them from any other person, yea, even to their own Incestuous or Adulterous brethren they may be Executors, or receive any other Testamentary benefit from them. *Jul. Clar. sect. Testament. quest. 3. num. 4. Swin. part. 5. sect. 7.*

106. Also where they are appointed but only bare and nude Executors, and receive no benefit by the Testament; in such case, they be admitted Executors to their own natural Parents. *Simo. de Prat. de Interp. ult. Volunt. l. 5. fo. 17. num. 1. Swin. part. 5. sect. 7.*

107. The Adulterous Grandfather may bequeath any thing to the lawful children of his own unlawful sons or daughters, or ma-

the

them his Executors: but so cannot the Incestuous Grandfather. *Govar. in D. cap. 8. de sponsal. part. 2. sect. 5. num. 13. Bald. c. de Incest. Swin. part. 5. sect. 7.*

108. Several other Persons there are, who by the Civil and Ecclesiastical Laws are prohibited Testamentary benefits; but being that I find little or no mention made of them, either in our Common or Statute Laws, (which limit the power of those spiritual Courts here in *England*) I shall therefore pass them over in silence, and proceed to the next Chapter.

CHAP.

CHAP. V.

Of the several ways of appointing an Executor.

109. TO name or to appoint one as Executor, is to place one in stead of the Testator, who may enter to the Testator's goods and Chattels, and have an Action against the Testator's Debtors, and may dispose of the same goods and chattels towards the paiment of the Testators Debts, and performance of his Will: which if he neglect to do, he may be sued by the Creditors or Legataries, so long as he hath Assets in his hands. *Noyes Max. p.* 10[illegible] *Terms of the Law, verb. Execut. Swin. part.* 4. *sect.* 2.

110. Now this naming or appointing an Executor is the head of

he Teſtament; and, as the body is ead that lacketh an head, ſo the eſtament is, as it were dead, that acketh an Executor; for it is the oundation of the Teſtament: and o Teſtament can ſtand without , or, be called a Teſtament: and hough there be never ſo many Le- acies or Deviſes given therein, et it is but a Codicil or Will, and ot a Teſtament, and the Admini- ration of the goods, with ſuch odicil or Will annexed ſhall be ommitted to the next of kin of he party deceaſed, as of one dy- ng Inteſtate. *Juſtin. Inſtit. l. 2. tit. e Legacies, N. 34. Swin. part. 4. ect. 2.*

III. But if an Executor be na- ed, though no Legacie be left, or Deviſe made, yet ſuch diſpoſition s a Teſtament, whether the ſame e ſolemn or unſolemn, written or nuncupative, priviledged or nnpriviledged: and, in this caſe he Ordinary cannot commit the

Ad-

Adminiſtration of the dead ma… goods, as of one dying Inteſtate, … ſuch Executor be capable and w… ling to undertake the Execution … the Teſtament. *Bro. Abr. tit. Exe… F.N.B. cod. tit. Swin. part. 4. ſect.* …

112. And as to the appointing … an Executor, it may be done eit… ſimply or conditionally; or, from … certain time, or, to a certain time … or univerſally, or particularly; … in the firſt, ſecond, third, or four… degree, &c. And laſtly, one, or … vers may be appointed Executo… *Bro. tit. Executors, N.* 2, 9, 13, 24, … 117, 155. *Dyer fol.* 3. *Cowels Inſtit.* … 129.

113. If the Teſtator ſay, I ma… *A. B.* my Executor; or, I inſtitu… *A. B.* my Executor; or, I will th… *A. B.* be my Executor; or, I defi… *A. B.* to be my Executor; or, *A.* … ſhall be my Executor: theſe a… ſuch like words make a ſimple No… mination of an Executor, where … condition is annexed by the Teſta…

tor

or: and it is not material in what part of the Testament the Executor is appointed; for the Law regardeth not so much the form or the words, as the meaning of the Testator. *Mich. Graff. thesaur. com. pin. sect. Legatum, quæstio* 43. *N.* 2. *& sect. Institutio, quæstio* 1. *&* 14. *Swinbor. part.* 4. *sect.* 4. *num.* 2, 3, *&* 11.

114. Therefore if the Testator say, I commit all my goods to the disposition of *A. B*; or, I commit my soul, and all my goods to the hands of *A. B*; or, I make *A. B.* Lord of all my goods; or, I make my wife Lady of all my goods; or, I leave all my goods to *A. B*; or, I make *A. B.* Legatary of all my goods; or, I leave the residue of all my goods to *A. B*; in these cases it is presumed that such person is intended to be made Executor by the Testator: for, it is not alwayes necessary to express the word *Executor*, neither

neither hath every Executor ſk
ſo to do: therefore, if the Teſta
write after this manner; *In all*
Goods movable and unmovable I ma
A. B. though the Teſtator do n
add *Executor*, yet it is to be unde
ſtood and ſupplied. *Bro. Tit. Exec*
tor. 98. *Mich. Graſs. theſaur.*
opin. ſect. Inſtit. quæſtio 14. *Sm*
part. 4. *ſect.* 4. *num.* 4. 5. *Franc. Ma*
tica de conject. ult. volunt. l. 4. *tit.*
num. 5. *&* 8.

115. If the Teſtator ſay, I ma
A. B. my Executor, if *C. D.* will n
in this Caſe *C. D.* is preſumed to
Executor, and may be admitted,
he pleaſe, and exclude the othe
Or, if the Teſtator, ſuppoſing
Child or Friend to be dead, ſay
his Will, *Foraſmuch as my Child,*
Brother is dead, I make A. B.
Executor: In this Caſe, if t
Child or other perſon be alive
whom the Teſtator imagined to
dead, then he that is named Ex
cutor ſhall not be admitted to t
Ex

Executorship, but the Childe, or other Person, whom the Testator thought to have been dead. *Franc. Mantica de conject. ult. volunt. l. 4. tit. 4. Swin. part. 4. sect. 4. num. 6.*

116. When the Testator doth add something to the assignation of an Executor, whereby the effect of the disposition is hindred or suspended, and dependeth upon some future event, then such assignation of an Executor is conditional: and there are divers words whereby the disposition of the Testator is made conditional; as, *if*, *when*, *whiles*, *whereſoever*, *whenſoever*, and several other, *&c. Mich. Graſ. Theſ. com. opin. ſect. Legatum, queſtio* 46. *Franc. Mantica de Conjectur. ult. Voluntat. lib.* 10. *tit.* 5.

117. And as there are divers words which make a conditional disposition, so there are divers sorts and divisions of conditions; whereof some necessary, some impossible, some possible, or indifferent: when the

the Condition is extreme, (that is to say) either necessary or impossible for such a Condition hinders not the Executor or Legatary, but that he may be admitted to the Executorship, or recover the Legacy as if such Condition had not been at all expressed. *Justin. Instit. de Haeredibus Instituendis, num. Swin. part. 4. sect. 5. num. 4. & sect. 6. num. 2.*

118. But when the Condition is not extreme, but indifferent or possible, then it must first be fulfilled before the Executor be admitted, or the Legatary recover his Legacy, but there are divers limitations in both these Rules, as will appear by the several Cases hereafter mentioned in this Chapter. *Mol. Graff. Thesaur. com. opin. sect. Legat. Quaestio 52. Swin. part. 4. sect. 4. num. 4.*

119. If the Testator make *A.* his Executor, or give him an hundred pounds, if, or when, his Son dies

her

ere the Executor or Legatary can-
ot obtain the Executorſhip or Le-
acy till ſuch a thing happen, but
uſt wait the event of the Conditi-
n. *Paul de Caſtr. in li. extraneum, l.*
. cap. de Hæred. Inſtituendis. Swin.
art. 4. ſect. 6.

120. If the Teſtator make *A. B.*
is Executor, or give him an hun-
red pounds if he marry the Te-
tator's daughter, ſuppoſing her to
e living, whereas ſhe is dead; in
his caſe, though the Condition be
mpoſsible, yet, becauſe the Teſta-
or did think her to be living, and
herefore the Condition poſsible, *A.*
B. in this caſe cannot be Executor,
or obtain the Legacy: or, if the
daughter were living, but died be-
fore Marriage, in ſuch caſe it is all
one; but if ſhe were living, and af-
erwards did refuſe to marry, yet
notwithſtanding *A. B.* might be ad-
mitted to the Executorſhip, or ob-
tain the Legacy. *Franc. Mantica de*
conject. ult. volun. l. 2. tit. 16. num. 23.

Me-

Menoch. de præsumpt. l. 4. fol. 706. 40. *Swin. part. 4. sect. 6. num.* 14, 15.

121. But if the Testators Daughter were willing afterwards to marry with *A.B.* before he have obtained the Executorship, or Legacy, then he refuseth her; in this case he ought not to be admitted to the Executorship, or obtain the Legacy, unless after her refusal first, and before her willingness be married to another woman, have obtained the Executorship Legacy, and is possessed thereof for then her Repentance comes too late. *Franc. Mantica de conjectur. ult. voluntat. lib.* 11. *tit.* 18. *num.* 30, 38. *Menoch. de presumpt. lib. fol.* 183. *num.* 29. *Swinbor. part. sect.* 10.

122. Also if the Testator make *A. B.* his Executor, or give him 100 pound if he marry his daughter, and he refuses to marry her; he he cannot be admitted to the Executorship

cutorship, or obtain the Legacie, although afterwards he be willing to marry her, and then she will not marry him; unless, that at such time when he refused, he were not of sufficient age to marry: for his dissent at that time when he could not consent, doth not hinder him, nor is it a breach of the condition. *Mich. Graff. Thesaur. com. opin. sect. Legatum, Quæstio* 46. *num.* 16. *Menoc. de præsumpt. l.* 4. *fol.* 698. *num.* 22. *Swinborn. part.* 4. *sect.* 8.

123. If one make *A. B.* his Executor, or give him an hundred pounds, if he erect a Monument within 3 days after the Testator's death: in this case, if the Executor or Legatary do perform the same with as much speed as is possible, it is sufficient, though it was not done within three dayes. *Swin. part.* 4. *sect.* 5. *num.* 11.

124. If the Testator charge his Executor, to whom he hath given

all the residue of his Goods, T
if he do not touch the Sky w
his Finger, or kill his Father,
pay then to *A. B.* 100 pounds:
this case he is not bound to t
performance, for such Legacy
A. B. is void. *Reformatio Legum E*
cles. tit. de Testamentis, C. 15. *f*
135. *Swin. part.* 4. *sect.* 6. *nu*
12.

125. Where the Testator mak
thee Executor, or gives 100 poun
if thou pay 10 pounds to *C. D.* b
fore a certain time, within wh
time *C. D.* dyeth, and then thou pa
the 10 pounds within the time
his Executor, or Administrator:
this case, because thou didst not p
the 10 pounds to *C. D.* himself, th
canst not be Executor, nor obt
the Legacy. *Franc. Mantica de c*
ject. ult. volunt. l. 11. *tit.* 17. *num.*
Swin. part. 4. *sect.* 7.

126. But if thou be made Exec
tor, or 100 pounds is bequeathed
thee, if thou pay unto the Testato

on (being an Infant) ten pounds: this caſe, if thou pay to the Childe's Tutor, it is a ſufficient performance of the condition. *Mich. Graſ. Theſaur. com. opin. ſect. Legatum, Queſtio* 52. *Franciſc. Manica de conject. ult. voluntat. l.* 11. *t.* 17. *num.* 29. *Swin. part.* 4. *ect.* 7.

127. Alſo if the Teſtator make thee Executor, or, give thee an hundred pounds, if thou go to Church on *Eaſter*-day; and, when the day comes thou art willing to go, but art not able to do it, by reaſon of overflowing of waters, or ſome other neceſſary impediment; in this caſe notwithſtanding thou ſhalt be admitted to the Executorſhip, and mayſt recover the Legacy, as if thou hadſt gone to the Church that day, but, if at the day thou wert going to the Church, and by the way committeſt ſome crime, whereupon thou art arreſted and layed; in this caſe thou ſhalt not

be admitted to the Executorship, recover the Legacy, because th wert the cause thy self where the condition was not performe and the other was *Actus Dei. Min in sect. penult. Inst. de Hæred. num. Franc. Mantica de conject. ult. vol lib.* 11. *tit.* 16. *num.* 24. *Swin. p* 4. *sect.* 8.

128. If the Testator make th Executor, or give thee an hund pounds if thou marry his Daugh within a Month; and another p son doth hold her purposely fr thee, that thou canst not marry within the time: yet, in this c the condition is reputed to be pef med by reason of thy willingn and thou maist obtain the Execut ship or Legacy, but, if such p son doth not detain her purpo ly, but is ignorant of the Testat Will, then, in such case the Con tion is not taken to be perform *Franc. Mantica de Conjectur. Voluntat. l.* 11. *tit.* 16. *num.*

win. part. 4. *ſect.* 8. *num.* 19.

129. If the Teſtator make thee Executor, or give an hundred pounds if thou bury his body within the Cathedral Church of St. *Peters* in *York*, and the Teſtator afterwards dieth excommunicate, for which his Sepulchre is denied, ſo that thou canſt not bury him there; yet notwithſtanding, becauſe it was not by fault but the Teſtator's, thou maiſt therefore obtain the Executorſhip or Legacy. *Sichard. in l.* 1. *cap. de Inſt. & Subſtitut. num.* 1. *Swin. part.* 4. *ſect.* 8. *num.* 18.

130. If the Teſtator make his Wife Executrix, or give her an hundred pounds, if ſhe abideth with his Children; in this caſe, if ſhe enter into bond to perform the condition, or elſe to make reſtitution, ſhe may then be admitted to the Executorſhip; or, obtain the Legacy. *Paul de Caſtr. in d. li. Mutiana, ſect. Sorum. Simo. de Prat. de Interp. ult. Volunt. lib.* 5. 42. *Interp.* 2. *dub.* 1.

num. 24, 25. *Swin. part.* 4. *sect.* 9. *formatio Leg. Eccl. tit. de Testam. c.*

131. Also, if the Testator ma the Executor, giving thee an hu dred pounds if thou never play Cards or Dice, or, if thou never gi away thy Lands: in such case, tring into sufficient Bonds to p form, the Condition, or else, to ma restitution, thou mayst then be mitted to the Executorship, or tain the Legacie. *Paul de Castr. L. Mutiana. Simo de Pratis. de Int alt. Vol. li.* 5. *Interp.* 2. *dub.* 1. *num. Swin. part.* 4. *sect.* 9.

132. But if the Testator ma thee Executor, or give thee an hu dred pounds, if thou never play Cards or Dice, or, if thou do not any time give away thy Lands to *B.* here thou canst not be admitted the Executorship, nor obtain the L gacy, until the condition be brou into that state, that it cannot be fringed. *Glos. in d. L. Mutian. Sw part.* 2. *sect.* 9. *num.* 14.

13

233. Thoſe conditions which to impugn and hinder that Liberty which every Teſtator ought to have by the Law in the making of his Will, are accompted unlawful; therefore, if the Teſtator make thee his Executor, or, give thee an hundred pounds if thou ſhalt make him thy Executor, or give him an hundred pounds in thy Teſtament: or, if the Teſtator make thee Executor, or, give thee an hundred pounds, if *A. B.* will; or, if the Teſtator make ſuch a perſon Executor; or, give him an hundred pounds whom thou wilt appoint: in theſe caſes, though thou name one to be Executor, or, that *A. B.* will that thou be Executor, or, have the Legacy; yet, thou ſhalt not be admitted to the Executorſhip, nor have the Legacy, becauſe by ſuch means that free liberty which every Teſtator ought to have in the making of his Teſtament might be taken from him; and he deprived

of that priviledge; therefore ſuch diſpoſitions are ſaid to be captious. *Richard. in li. Captoriæ, cap. de Mil. Teſt. num. 6. Mich. Graſs. Theſaur. com. opin. ſect. Inſtit. quæſtio* 18. *Swin. part.* 4. *ſect.* 11.

134. But if the Teſtator make thee Executor, or give thee an hundred pounds, if *A. B.* ſhall eſteem it convenient; in this caſe, if *A.* eſteem it convenient thou be admitted Executor, or have the Legacy of an hundred pounds, then thou art to be admitted to the one, and may obtain the other: or, if the Teſtator make one of his Servants his Executor, whom thou ſhalt chuſe; in this caſe, him whom thou ſhalt chuſe of the Teſtator's ſervants ſhall be Executor. Note the diverſity of theſe two Caſes, from the Caſe laſt going before. *Mich. Graſ. theſaur. com. opin. ſect. Inſtit. quæſtio* 18. *num. 6. Swin. part. 4. ſect.* 11.

135. If the Teſtator make thee Execu-

Executor, or give thee an hundred pounds if thou never marry, or, if thou marry according to the appointment or conſent of ſome other perſon; the firſt of theſe Conditions is unlawful, becauſe it forbids Marriage wholly; and the ſecond is unlawful, becauſe it is referred to another perſon to make choice for thee, who perhaps may chuſe ſuch an one as it is not fit, or lawful, for thee to marry with her: therefore, in the firſt Caſe, thou maiſt be admitted to the Executorſhip, or obtain the Legacy, as if no ſuch condition had been: and, in the ſecond Caſe, thou maiſt make choice of a woman thy ſelf, (without the appointment of the other perſon) and marry her; and then thou maiſt be admitted to the Executorſhip, or, obtain the Legacy, but not before Marriage. *Franc. Mantica de conject. ult. volunt. lib. 11. tit. 19. Covar. Epitom. de Sponſal. cap. 2. ſect. 9. num. 11. Swinburn. part.*

part. 4. ſect. 12. Mich. Graſſ. Th com. opin. ſect. Legat. queſt. 5 num. 9.

136. But if the Teſtator mak thee Executor, or give thee a hundred pounds, if thou doſt n marry before the age of one an twenty years; or, if thou doſt no marry a widow; or, ſuch or ſuch woman, or, if thou doſt not mar in the City of *York*; in theſe cas if thou break the Condition, the thou looſeſt all thy intereſt as to th Executorſhip or Legacy. *Franc. Ma tica de conject. ult. Volunt. lib.* 11. ti 19. *num.* 8, 9. *Swin. part.* 4 *ſect.* 12.

137. Alſo, if the Teſtator mak thee Executor, or give thee a hundred pounds, if his daughter d not marry; in this caſe, if ſhe di unmarried, thou art to be admit ted to the Executorſhip, or obtai the Legacie: but, if the Conditi on were, that thou ſhouldſt be Exe cutor, or have an hundred pounds

if thy daughter did never marry; in this Case, though she die unmarried, yet thou art not to be admitted to the Executorship, or obtain the Legacy, because it shall be presumed that thou didst perswade and hinder thy daughter from Marrying; and therefore, to prevent such Fraud, the Law doth reject such Condition. *Franc. Mantica de conject. ult. Volunt. lib.* 11. *tit.* 19. *num.* 5. *Swin. part.* 4. *sect.* 12.

138. If the Testator, make thee Executor after the expiration of five years after his death, or, he doth make thee Executor for and during five years after his death; this Assignation is lawful, and the Ordinary may commit the Administration of the Deceased goods, in the mean time, to the next of kin, during which time the act of the Administrator is good, and cannot be avoided by the Executor afterwards: and the Ordinary may also commit the Administration of the Deceased's

ceased Goods unadministred by the Executor, after the expiration of the time of the Executorship, where thou art appointed Executor but for a time. *Bro. tit. Administr.* 45. *tit. Exec.* 155. *Plo. com. in Griesby and Foxes case. Swin. part* 4. *sect.* 17.

139. If the Executor make his wife Executrix; and, if she will not, or cannot be Executrix, then he maketh his son Executor; and if his son be not Executor, then he maketh his Sister Executrix; and if she be not Executrix, then he maketh his brother Executor: in this Case, the Testator is said to make degrees of Executors; and in this example there are four degrees of Executors. And observe always, the Executors in the first degree (as the Wife is here) is said to be *instituted*, and all the rest *substituted*. *Mich. Graß. thesaur. com. opin. sect. Substit. quæstio* 1. *Swin. part* 4. *sect.* 19.

140. Note alſo, that it is lawful for the Teſtator to make as many degrees of Executors as he pleaſeth; and he may ſubſtitute into the place of one Executor, either one or more; and into the place of many Executors he may ſubſtitute one alone, or he may ſubſtitute to every Executor one, or one of them to another. *Juſtin. inſtit. tit. de. vulgari ſubſtitutione, num.* 1, 2. *Swin. part* 4. *ſect.* 17 *Cowels Inſt. p.* 131.

141. But if the Teſtator do inſtitute divers Executors, ſubſtituting one or more to them; ſo long as any of them which was firſt inſtituted may be Executor, the ſubſtitute is not to be admitted, unleſs the Teſtator do appoint to every ſuch Executor a ſubſtitute; for then any one of theſe firſt inſtituted Executors, not being able, or refuſing to be Executor, his Subſtitute is then to be admitted with the reſt of the Executors firſt inſtituted;

ſtituted; whereas otherwiſe, [illegible] one of the firſt inſtituted Executo[rs] in the firſt degree, lawfully unde[r] taking the Executorſhip, all [the] ſubſtitutes are excluded: and, [in] ſuch caſe, if the Executor afte[r] wards die inteſtate, then the [Ad]miniſtration is to be committed [to] the reſt of the goods of the Teſta[tor] deceaſed, not adminiſtred by [the] Executor, except in ſome ſpec[ial] caſes. *Mich. Graſſ. theſaur. com. [opin.] ſect. Subſtit. queſtio 9. Repam. l. 1. de vulgo Subſtit. num.* 185, 18[6] *Swin. part 4. ſect.* 19.

142. If the Teſtator make th[ee] Executor if thou give ten pou[nds] to *A. B*; and, if thou do not, then [he] doth appoint another to be Exec[u]tor: though thou refuſe to gi[ve] ten pounds to *A B*, yet cannot th[e] other be Executor, unleſs he giv[e] ten pounds to *A. B.* becauſe th[e] condition of giving, expreſſed [in] the inſtitution, is underſtood [to] be repeated in the ſubſtitution. *A[n]*

Hoch. de præsumptio 177. *num.* 28. *Swin. part* 4. *sect.* 19.

143. Note, that every one may appoint as many Executors as he lists, so that the number be not infinite, as to say, *I make all the men in the world my Executors*: for, such an Assignment (being an Argument of insanity of the mind) is void, at least in effect. *Mich. Graff. thesaur. com. opin. sect. Instit. quæstio* 13.

CHAP. VI.

Of appointing Tutors, and some few things touching Childrens Portions.

144. NOte, that every one, who may be an Executor, may be a Tutor; but no Tutor may intermeddle as Tutor, untill he be

be confirmed by the Ordinary; and where one that is named Tutor is Lunatick, or, absent beyond Sea, in such like cases the Ordinary may appoint another during such impediment: Also, it is the custom of several places, that when divers are appointed Tutors there, in such case one alone may Administer, when the other cannot or will not intermeddle with the Tutorship. *Swin. part 3, sect. 10, 12. Cowels Inst. p. 31.*

145. And it is also the custom of several places, that if the Father appoint not a Tutor by his Will to his Children, then the Mother by her Will may appoint one; and if neither Father nor Mother appoint one, then a Stranger (if he make the Child his Executor) may appoint one; and if there be no Tutor Testamentary, then the ordinary may appoint one. *Fleta l. 1. c. 9. Swin. part 3. sect. 9. Vide Co. 3. li. fo. 38. Cowels Inst. p. 30, 41. Noys Maximes, p. 105.*

146. Now

146. Now as to the appointing of Tutors, it matters not by what form of words they are appointed, ſo that the Teſtators meaning can but appear; nor, in what Language the Tutor is aſſigned, whether in Engliſh, Latine, Greek, or any other Tongue. *Swin. part* 3. *ſect.* 12. *Socin. Jun. Conſil.* 83. *Vol.* 1.

147. It was the cuſtom of many places formerly, that a Boy after he had accompliſhed the age of fourteen years, and a Girl after ſhe had accompliſhed the age of twelve years, might then chuſe their own Tutors, if they pleaſed, and refuſe the Tutors appointed them by their Fathers Will; but now by the Statute of 12 *Car.* 2. *cap.* 24. every Father, whether he be of the age of twenty one years or under, may, by Deed executed in his life-time, or, by his laſt Will and Teſtament in writing, delivered in the preſence of two or more credible Witneſſes, diſpoſe of his Children under the age

age of twenty one years, and not married at the time of his death for and during such time as the shall remain under the age of twenty one years, or any lesser time, the custody and tuition of any person or persons, in possession or remainder (Popish Recusants excepted) and such disposession of such Children, since the 24. of *Feb.* 1645. or, hereafter to be made shall be good against all and every person and persons, claiming any such Children, as Guardian in Soccage, or otherwise. *Lit. l. 1. c. 5. Swin. part 3. sect. 11. Vide Noy Max. p. 105. & Cowels Inst. p. 33. 12 Car. 2. c. 24.*

148. And such person to whom such Children shall be disposed or devised, may have an Action of Ravishment of Ward or Trespass against such person, as shall wrongfully take away or detain such Child or Children, for the recovery of them, and recover damages

for

for the ſame in ſuch Actions, for the uſe of ſuch Child or Children; and they are alſo impowered by the ſame Act of Parliament, to take into their cuſtody, to the uſe of ſuch Child or Children, the profits of all the Lands, Tenements and Hereditaments of ſuch Child or Children, and the cuſtody and management of their Goods, Chattels and perſonal Eſtate, until the Age of twenty one years, or leſſer time, according to the Parents diſpoſition; and may bring an Action in purſuance thereof, as by the Law-Guardian in Soccage might do. 12 *Car.* 2. *c.* 24.

149. Note, that every Tutor ought to take care that his Pupil be honeſtly and vertuouſly brought up, and muſt provide for him Meat, Drink, Apparel, Lodging, and other neceſſaries according to his quality and condition, and ought

to

to dispose of his Pupil's Goods and Chattels to the Pupil's best advantage, in selling of such Goods as will not keep without damage, and preserving of the rest, till the Pupil come of age: And, to this intent, it is the custom in many places, especially within the Province of *York*, that the Tutor at the Entry of his Office makes a true Inventary of all the Goods and Chattels of his Pupils, and doth enter into Bond with Sureties before the Ordinary, to make a just accompt; and then he is admitted and confirmed, and may seize upon the body of the Pupil, and take possession of his Goods. *Bro. tit. Guardian, F. N. B. fol. 118. b. Swin. part 3. sect. 13. and Cowels Inst. p. 49.*

150. Formerly there were several Ages to be taken notice of, both in Boys and Girls, when they should be out of Tutorship; as, if a Boy were in Ward, by reason of Lands held in Knights service, he could not

not be out of Wardſhip till twenty one years of Age; but, in other caſes, at fourteen years of Age he might chuſe a new Tutor if he liked not his old, and might call his old Tutor then to accompt: and ſo a Wench at twelve years of age might chuſe her Tutor, unleſs ſhe were in Ward by reaſon of Lands held in Knights ſervice, as aforeſaid; and then ſhe was to continue in Wardſhip till ſixteen years of Age, unleſs ſhe were fourteen at the death of her Anceſtor; and then ſhe was free, and might chuſe her Tutor: but now theſe Wardſhips are quite taken away by the 12 *Car.* 2. and every one may diſpoſe of his Children to whom he pleaſeth, obſerving the Rules aforeſaid, in number 147. *Lit. l.* 2. *chap.* 4. *Brac. l.* 2. *c.* 37. *num.* 3. *Bro. tit. Guard.* 7. 35 *H.* 6. *fo.* 52. *Co. Litt. fol.* 78. *Fleta. l.* 1. *c.* 32. *Weſt.* 1. *c.* 22. *Mert. cap.* 6. *Co.* 2. *part. Inſt. fol.* 90. *and* 103, 135, 136. *Stat. Marlbr. c.* 17.

7. *Cowels Inst. p.* 37. *and* 49 *Swin part.* 3. *sect.* 14. *F. N.* 143.

151. Note that there is a general custom within the Province of *York*, and in several other places, that there is due to the lawful Children of every man being an Inhabitant or Housholder within the same Province, (and dying there or elsewhere) a filial or Child's part and portion, which is sometimes a third part, and sometimes an half part of the Father's clear moveable Goods, as hath been afore-shewed, unless the Child be heir to his Father, or were advanced by him in his life-time; upon which exceptions hereafter follow several observations. *Lindwood in C. Stat. de Testament. l.* 3. *Provinc. Constit. Cant. Brac. l.* 2. *c.* 26. *F. M. B. de Cat. part honor. Swin. part* 3. *sect.* 18.

152. As, if the Father should by his last Will and Testament forbid his

his Child to have any portion of his Goods, ſuch Will in ſuch Caſes is void, and the Child may notwithſtanding recover his filial part or portion: alſo, if the Father ſhould leave his Child but twenty pounds, when by the rate of the Inventory it comes to an hundred pounds; here he may refuſe the Legacie, and recover his full portion, notwithſtanding the Will: or, if the Father ſhould impoſe any condition upon the ſaid portion, as to be paid ſeven years after his death, or the like, yet the Child may ſue for it preſently after his Fathers death, and recover it before the ſeven years be out; for it is preſently due upon the Fathers death, notwithſtanding his Fathers Will to the contrary: and if the Father by his Will ſhould bequeath the Portion after the Childs death to any other perſon, in ſuch caſe the Will is void, and the Portion ſhall go to the Executors or Adminiſtrators of the

the Child after his death: But, ſuppoſe if the Father leave t Child a far greater ſum then by t rate of the Inventary the Chil part would come unto; in this ca the Father may impoſe what co dition he pleaſeth upon it, and t Child muſt either take it with t condition annexed, or otherwiſe h may refuſe it, and ſtand to h Childs part without condition a nexed to it. *Swin. part* 3. *ſect.* 1 *numb.* 4,5,6,7 & 8.

153. Alſo, if a man have a So or Daughter married in his life time, who hath a Child or Chi dren, and then dies, and afterward the Grand-father dies; in this ca the Grand-children ſhall recov ſuch part of the Grand-father Goods as ſhould have been due t their Father or Mother for thei Childs portion if they had lived *Reformatio Legum Eccleſ. tit. Te cap.* 10.

154. If the Father leave a L gac

gacie to his Child, being neither Heir, nor advanced by him in his life-time, and do not mention whether it should be in lieu and recompence of his filial portion or no; in such case, if it be as much or more in quantity then the filial portion extends unto by the rate of the Inventary, or, if it want but a very little thereof, then, it shall be presumed to be given in lieu of his Portion; but, if the Legacie be very small, then the Child shall both recover the said Legacie, and his filial Portion. *Menoch. de Præsumpt. l. 4. Præsumptio 109. num. 6. 26. and 110. Swin. part 3. sect. 18. num. 9.*

155. Where the Child is Heir to his Father in Fee-simple or Fee-tail, though the Lands be but of very small value in regard of the personal estate of his Father, yet he is thereby barred from having any filial Portion, by the custom of the Province of *York*, and some other

places: yea, although he be b... Heir in reversion, or hold Lands ... Heir, which are but Morgaged wi... power of Redemption upon pa... ment of such a sum of money a... certain day; yet during such hol... ing, till the condition be perfo... ed, he is barred of his filial po... tion; but if he have only cop... hold-lands after his Father's dea... in such case, he is not barred fro... the recovery of his filial portio... *Dyer fol.* 124. *pl.* 38. *Swinb. p...* 3. *sect.* 18. *and the opinions of ...* Tho. Hescoth *Doctor of the C... Laws, and Sir* Jo. Savile, *one of ... Barons of the Exchequer, Judg... Assize at* York 1604. *cited ... Mr.* Swinborn *in his Margi... Notes.*

156. If the Father bestow ... give any thing to a man of tra... to take his son an Apprentice, ... to teach him his Trade; or, bestow ... any thing upon a Schoolmaster ... Tutor in the Universities of ...

ford or *Cambridge*, for the increase of his Childs knowledge in Learning; or, buy an Advowson, or, Ecclesiastical Benefice or Dignity, and afterwards presents his Son to it; or, the Son being much indebted, the Father pays off his debts, or buyes an Office, and bestows it upon his Son; or if any other but the Father bestow a preferment on his Son, though it be never so much; yet none of all these shall be accounted such preferment or advancement, as to bar the Child from the recovery of his filial portion. *Claudius Battandier, Tract. de Legitima, cap.* 12. *num.* 19, 20, 21, 22, 28, 31. *Swin. part* 3. *sect.* 8

157. But, it is said by some, that if the Father bestow a Lease upon his Child, or grant to him an Annuity for life out of his Land; and though the Child be to reap no benefit by these during his Fathers

life, but after his death yet it held for a preferment, becauſe was aſſured to him in his Fathe life-time. *Swin. part.* 3. *ſect.* 1 *num.* 25.

158. And, it is granted for ce tainty, that if the Father beſtow competent portion with his Daugh ter in Marriage, upon him th ſhould marry her; this is ſuch a advancement as ſhall bar her fro the demand of a filial Portion: b it is to be underſtood, that this com petent Portion muſt be equal, or, n far inferiour to that quantity whi ſhould fall to be due to ſuch a chil after the rate and proportion of t Father's eſtate, at that very ti when he beſtows it on his Ch and not according to ſuch quanti as ſhould fall due at the time of t Father's death afterwards. *Sw part.* 3. *ſect.* 18. *num.* 22, 26, 27.

159. But if ſuch gift be not com petent, but far under the rate part of that which would fall

to the Child, as 5 *l.* to put in his Purse, or spend at his pleasure, when perhaps the filial Portion would amount to several hundreds of pounds; this is not such an advancement as shall hinder such Childe from the recovery of a filial portion. *Swin.* 3. *sect.* 18. *num.* 28.

160. Or, if a man seised in Fee-simple of thirty Acres of Land, hath issue two Daughters, and giveth ten Acres with one of them in Frank-Marriage, and dieth seised of the other twenty Acres, in this case, she that is married may, if she will, have part of those twenty Acres also, and put them in *hotchpotch* with the other Land, and suffer the same to lie commixed and mingled together, and so an equal division shall be made betwixt the two Sisters, and each of them shall have fifteen Acres, whereas otherwise the Sister married would get but ten Acres. *Litt.* 59. *Fynches*

Law, pag. 124. Terms of the La verbum Hotch-potch. Swin. par sect. 18. num. 33.

191. Note, that by Portion to be understood not only a sum money, or part of the Fathers Goo and Chattels; but also Lands a Annuities bestowed by the Fath upon the Child, Swin. part. 3. sect. num. 29.

CHAP. VII.

What things are Deviseable by W and what not.

192. OF Lands, Tenemen and Hereditamen some are deviseable by Custo and some by force of certain St tutes, as hereafter appears. C el's Inst. page 138. Swin. part sect. 2.

193. Lands, Tenements,

Hereditaments holden in Gavelkind by the custom of *Kent*, though they be holden in Knights service, may be given or devised by Will, and that without licence of the Lords, saving to the the Lords the rents and services due out of the same Lands and Tenements. *Terms of the Law, verb. Gavelkind. Mich. 1655. in B. R. Hammond and Thornhills Ca. Styles Rep. fol. 476. Swin. part. 3. sect. 3.*

164. And so lands, tenements and hereditaments lying in *London, York Oxford*, &c. and other places where the same are held in Burgage-tenure, may be devised by Will, for to hold in fee-simple, fee-tail, for life, for years, *&c.* and if he who holds such lands, *&c.* in burgage-tenure, be a Citizen or Burgess of the City or Burrough, where such Lands, tenements or hereditaments be holden in burgage-tenure; then he may devise the same in Mortmain, which otherwise he could not

do, if he were not Citizen, Burgess or Freeman of the same place: and it is not necessary that the Will wherein Burgage-land is devised should be in writing. But note, that the custom of the place must be observed, concerning the Probate or Inrolment of such Wills, &c. *F. N. B. Bre. ex gravi querela in pr. Brook. devise* 22, 43 & 51. *Dr. & Stud. l.* 2. *cap.* 7. & 10. *Swin. part.* 3. *sect.* 3. *Perkins, sect.* 577, 578. *pag.* 49 E. 3. *devise* 8.

165. The Wife, so long as she lives unmarried, shall have half of her Husbands lands holden in Gavel-kind. *Co. on. Litt. fol.* 111. *Old Terms of the Law, verb. Gavelkind.*

166. And of Lands held in Burrough English, by the custom of some places, the Widow shall have the whole, and sometimes the half of her Husbands Estate. *Dum sola & casta vixerit. Co. on Litt. fol.* 111. *F. N. B.* 50. *Littl. l.* 2. *c.* 10.

167.

167. By the Stat. 32 *H.* 8. *cap.* 1. every one (except a woman Covert, an Infant under the age of one and twenty years, or, a person *De non sane Memorie*) may by their last Will and Testament in writing, or other Act lawfully executed in their life-time, give, dispose, Will or devise, all such Lands, Tenements and Hereditaments, as they are solely seized of in Fee-simple, or, as much of right as in them is, of all such Lands, Tenements, and Hereditaments, as they are seized of in Fee-simple in Copercenary, or in Common in Fee-simple, to any person or persons (except to Bodies politick and corporate.) And two parts of three of all such Lands, Tenements, or other Hereditaments, as they hold in Knights Service. See now the 12 *Car.* 2. *cap.* 24. 32 *H.* 8. *cap.* 1. 34. *and* 35 *H.* 8. *cap.* 5. *Lynch. Law, pag.* 169, 170. *Co. in Littl. fol.* 111. *by Swin. part.* 3. *sect.* 3. *and* 4. *And Wingates*

gates Abr. of Stat. tit. Wills.

168. All manner of Goods and Chattels real and personal, moveable and immoveable, may be devised by Will or Testament, except in some certain cases following. *Perkins, sect.* 511. *Lind. in C. Stat. de Testament. l.* 3. *Provinc. Cant. Cantabr. Swin. part* 3. *sect.* 5. *Cowel Inst. p.* 140.

169. As where two men are jointly possessed of Goods and Chattels, real or personal, one of them cannot make his Will, and bequeath his part to another: for when he dies, his part goes to the survivor: and so it is in Lands, Tenements, and Hereditaments also. *Perkins, sect.* 500, 526. *Dr. & Stud. l.* 1. *c.* 6. *Litt. l.* 3. *c.* 3. *Cowels Inst. pag.* 140. *Clerk of Assize, pag.* 6[illegible]

170. Nor can a spiritual Person, or Master of a Colledge, or Hospital, or Mayor of a City, devise those things which belong to their Church, Colledge, Hospi[illegible]

tal, or City; nor can the Crown or Jewels of the Realm be devised by Will, but they may be given by Letters patents; and a Parson by Will may devise the Corn growing on the Glebe-Land, at the time of his death. *Perkins, sect.* 496. and 497, 498. *Brat. l. 1. c. 2. cap.* 14. *Dr. & Stud. l. 2. c. 39. Cowels inst. p.* 125. *F. N. B. devise* 3. *& Exer.* 108. *Swin. part* 3. *sect.* 6.

17. The Husband cannot devise such Goods as his Wife hath, as being Executrix to another; nor such things as are in Action, as debts due to her before Marriage by Obligation or Contract, unless he and his Wife sue and recover the same during Marriage, or that he renew the Bonds, and take them in his own Name; otherwise after his death they remain to her. *Co. on Litt. fol.* 351. *b.* 9 *H.* 6. 52. *&* 21 *H.* 7. *fol.* 29. *Kitchin, fol.* 251. *a. Finches Law, pag.* 44, *&*

168.

168. *Bro. Testament.* 11. *Swin. part.* 1. *sect.* 9. *num.* 13.

172. Also, if the Husband be possessed of a term or Lease for years in right of his Wife, he cannot devise it by his Will, but he may grant it away, or dispose of it in his life-time; or, if he make no disposition thereof, yet, if he survive her, then it falls to him; and in such Case he may devise it by Will. *Dame Hales's case. Plo. Com. fol.* 260. *Co. on Litt. fol.* 251. *Kitchin, pag.* 267. *b.* 7 *H.* 6. 1. *Perkins, sect.* 560. *Dr. & Stud. l.* 1. *ca.* 7.

173. An Administrator cannot devise those goods by Will, which he hath as Administrator to another person dying intestate, but Administration thereof shall be committed to the next of Kin to the first intestate; neither can an Executor devise those Goods by way of Legacy, which he hath as Executor; but he may make his

Testament, and appoint another Executor, who shall have the Administration of the same Goods, to the use of the first Testator. *Fynches Law*, pag. 168. *Bro. Adm.* 7. *F. N. B. Adm.* 31. 51 *E.* 3. *cap.* 11. *Pla. com. fol.* 525. 526. *Swin. part.* 3. *sect.* 6.

174. Those things also which belong to the Heir after the Testator's death, cannot be devised by Will, as Glass-windows, Wainscote, Tables dormant, and Benches affixed thereunto, or mortised in the Earth; Fornaces, Coppers, Leads, Ovens, *&c.* set in Mortar or Stone; nor Trees, nor Grass-growing, *&c. Bro. Exer.* 65. *Cowel's Inst. p.* 140. *Co.* 4. *Rep. fol.* 62. *Swin. part.* 3. *sect.* 6. *Noyes Max. p.* 106.

175. But Corn growing on the Land at the time of the Testator's death, may be devised by Will, by those who are seised in Fee-simple, Fee-tail, or for life; and also by

Tenant

Tenant in Dower, Tenant by the Curtesie, and Tenant in Morgage and their Tenants; and he who is seized in the right of his Wife, although their Estates do determine before the said Corn be ripe and severed, except in some special Case. *Perkins*, *sect.* 512, 514. & 515. *Dr. & Stud. l.* 1. *c.* 20.

176. If a woman Tenant in Dower sow her Land, and afterwards marry, and the Husband dies before severance of the Corn; in this Case it remains to her, and he cannot devise it: but, if it had been sown after the marriage, he might have devised it. *Clark of Assize*, *pag.* 57. *Abr. Dr. & Stud.* *c.* 20.

177. If a Tenant for life have Hops growing, and die a little before the severance of them; in this Case the Executors or Administrators shall have them, and not he in Reversion or Remainder; for the Hops are accounted as Emble-

ments.

ments, they growing by Manurance and Industry of the Owner, by the making of Hills, and setting of Poles. *Vide Mich.* 11. *Car.* 1. *B. R. Luban and Atwoods Case, Cro.* 1. *part. fol.* 396.

178. As Goods and Chattels may be devised, as aforesaid; it is now further observable what a quantity or proportion of Goods and Chattels, the Testator may devise by his Will: observe therefore, that if the Testator have neither Wife nor Childe at the time of his death, he may then dispose and devise all the clear residue of his Goods and Chattels, over and above the discharging Funeral-expences and his Debts. *Lindwood in c. Statut. de Testament. lib.* 3. *Pro. Const. Cant. verbum defunct. Brac. l.* 2. *cap.* 26. *Swin. part.* 3. *sect.* 16.

179. But it is the custom of many places, especially within the Province of *York*, that if the Testator have

have a Wife or Childe at the time of his death, that then he can but dispose of half of such his clear Goods, and the other half is to go to the Wife or Childe; and, if he have both a Wife and Childe or Children, at the time of his Death, then the Goods are divided into three parts; whereof one part is to the Wife, another to the Childe or Children, and the other third part, called the deaths part, is left to his disposing; and, if no disposition be made thereof, it falls to the Executor: but note here, that if the Childe or Children were Heir to the Testator, or were advanced by the Testator in his life-time, then the Testator may devise one half of the clear goods, and the other half shall go to his Wife. *F. N. B. Brit. de Rat. part. Bonor. Bro. cod. tit. N. 1. M. 7. E. 4. fol. 21. a. Brac. l. 2. c. 26. Fleta, l. 2. c. 50. Glan. l. 2. c. 20. Co. 2 part. Inst. fol. 33. Swin. part. 3. sect. 26. Refor. Leg. Eccl. tit. Test. c. 10.*

180.

180. Note, where the Wife and Children ought to have a rateable part of the goods of the deceased, be it third part, or half, as the case is, there also they ought to have a like part of the debts due by the deceased, after they are recovered by the Executor or Administrator; but of Leases they can have no rateable part, where they use to have a rateable part of the moveable goods and debts recovered, unless it be by special Custom of the City, County, Deanry, or place where the Testator dwelled, and had such Leases. *Swin. part. 3. sect. 6. F. N. B. Breve de Rationabl. part. bon.*

181. This rateable part of the Goods to the Wife and Children, is saved to them by the Statute of *Magna Charta*; but note, the Wife or Children connot sue the Executor or Administrator for their rateable parts, till all the Testator's Debts be paid; and then what remains

maine is to be divided according t
the Rules aforesaid, into two o
three parts, before any Legacies b
paid out of the deaths part after t
division. *Magna Charta, cap.* 18. *L*
gist. fol. 142. *b. F. N. B.* 122. *b. M.*
E. 4. fol. 21. *a. 2. part. Instit. fo*
33.

CHAP. VIII.

Several Cases concerning the bequ
thing of Legacies, and also touchi
Devises.

182. AS an Executor may be a
pointed divers ways, as
shewed before, *chap.* 5. so also a L
gacy may be given after diver
wayes, either simply or conditio
nally, *&c. Swin. part.* 4. *sect.*
num. 2.

183. That Legacy is said to be pure and simple, which is given without a condition annexed to it: and, as in appointing an Executor, it matters not after what forms of words it be: so it is in the bequeathing of a Legacy, for it skills not after what form the same be given, so that the Testator's meaning do but appear whether it be in goods and chattels, or Lands and Tenements. *Swin. part. 4. sect. 4. num. 18.*

184. Note, that a Legacy may be given from a certain time, or, until a certain time, albeit the Legatary die in the mean time, before the day come, yet the Executors or Administrators or the Legatary may recover the same when once the day is past, as the Legatary himself might have done if he had lived so long; unless the meaning of the Testator be to the contrary, or, that it be such a thing as cannot be transmitted to the Executor,

as

as personal service: but, if the Legacy be given after an uncertain time, as where the Testator gives thee an hundred pounds when his Son shall die, or the like; there, if thou die before the time come, thy Executors or Administrators can then recover nothing. So, note the diversity. *Mich. Graſs. theſaur. com. opin. ſect. Legat. queſtio* 43. *Manica de conject. ult. voluntat. lib.* 11. *tit.* 20. *num.* 8. *Swin. part.* 4. *ſect.* 17. *Refor. Leg. Eccleſ. tit. Teſtamen. c.* 26.

185. If a man deviſe to his daughter an hundred pounds when ſhe ſhall be married, or to his Son when he ſhall be of the Age of twenty one years, here, if they die before the time appointed, their Executors ſhall not have it: But, if the deviſe were of an hundred pounds to the daughter, to be paid her when ſhe ſhall be married; or to the Son, to be paid him when he ſhall attain the age of twenty

one

one years; in ſuch caſe, if they die before ſuch time, then their Executors may recover the Legacy. *Tr. 1653. B. R. in Dumlowe & Shaws Ca. Hughes grand Abridg. 1 part. p. 664. l. 14.*

186. Note, that a Legatary may not of his own Authority take the Legacie, and ſerve himſelf, but muſt receive the ſame at the hands of the Executor; except in ſome caſes, as where the Legatary is poſſeſſed of his Legacy at the time of the Teſtator's death; for, in ſuch caſes, he may retain and keep it, if there be ſufficient Aſſets beſides in the Executors hand to pay the Teſtator's Debt: or, if the Teſtators give licence to the Legatary to enter to his Legacie, then he may do it without the Executors conſent; and, if he be both Legatary and Executor, then he may ſerve himſelf. *Perkins, ſect. 488. Hernes Law of Con. pag. 88. Socin. Jun. Conſil. 111. vol. 1. Swin part. ſect.*

sect. 4. num. 23. Perkins, sect. 570, 572, 573.

187. But the Legatary hath no remedy by the Common Law for any Legacy of goods to him bequeathed, if the Executor will not deliver the same: but he must, in this case, have a Citation for the Executor, to appear before the Ordinary, or other competent Ecclesiastical Judge, to answer him in cause of his Legacy, except in case where a particular thing is bequeathed, as the Testators Horse or Signet, *&c.* and in such case the Legatary may sue at Common Law for the same. *Bro. Devise, num.* 3, 6, 14, 27, 30. *Terms of the Law verbum Devise. Swin. part. 4. sect.* [illegible] *num.* 23.

188. Also if the Testator will that his Executors shall sell his Land, and pay such and such Legacies out of the Monies; in this case the Legataries may sue at Common-Law, and not in the Spi-

spiritual Court for their Legacies. *Mich.* 5. *P. & M. Dyer, fol.* 151, 152. *Mich. M.* 29. *& 30 Eliz. C. B. Gerrard's Case. Leon. Rep. fol.* 87. *& Tr.* 7. *Jac. C. B. Rott.* 895. *Edwards and Graves his Case. Hob. Rep.* 265.

189. But if the Legacies be granted to be paid out of Leases; and not out of Fee-simple Lands; then the Legatary may sue in the Spiritual Court for such Legacy, *Brownl.* 1 *part. Rep. fol.* 34.

190. *Testamento cum duo inter se dissentia reperiuntur, ultimum ratum est.* If there be divers devises of one thing in one Will, the last devise takes place only. *Co. on Litt.* 112. *b.*

191. If the Testator bequeath to *A. B.* all his Goods; in this case, it is the opinion of some, that *A. B.* shall have the Testator's whole Estate actively and passively, (on) his Lands, Tenements, and Freehold

Free-hold excepted) being in effe
his Executors or Heirs, as the C
vil Law terms him, and is he
by chargeable with the Testa
Debts so far as the Goods will e
tend. *Gloss. in L. his ver
sect. de Hared. Instit. Swin. part.
sect.* 10.

192. But others are of opi
on, that if a man grant *omnia*
na, (that is, all his Goods,) i
this case, Leases for years, no
Ward, nor things in Action,
Debts upon Promise or Obligati
shall not pass thereby, for th
are Chattels. 4 *Ed.* 6. *Bro.*
Grant. 51. *&* *Done* 43. *Kitchin*
44. *b.*

193. But if the Testator do
queath to *A. B.* all his Chattels,
in such case, he shall have the T
stator's whole Estate, Leases a
Wards too; for *Catalla* inclu
all but Free-hold, as well immo
able as moveable. *Standford,*
Prar. Regis, cap. 16. *Kitchin Co*
Li

Lett, pag. 45. a. & 46. a. Swin. part 7. sect. 10.

194. But note, that *A. B.* by such devise shall not have Glass of the windows, wainscote, Tables dormant, Fats in the Brew-house fixed to the Free-hold; nor Furnaces, nor the Box or Chest wherein the Testator's Evidences are; nor Hawks, nor Hounds, nor Doves in the Dove-house, nor Fishes in the Pond, nor Deer in the Park: for these things belong all to the Heir. *Touch. pag. 22. Noye's Maximes, p. 101. and 107. Vide Hill, 43 Eliz. C. B. Gray and Trowes Ca. Goldesbor. Rep. p. 29. pl. 24. 18 E. fol. 14. 4 H. 7, 10. and 21 H. 7, 26. Kitchin, pag. 45. b. 46. a.*

195. Note also, that if *A. B.* dye before he have proved the deceased's Will, wherein he bequeaths to him all his Goods, or, all his Chattels, as aforesaid; yet, in such case, administration shall be commited to the next of Kin to the said *A. B.*

and not to the next of Kin to the Testator. 23 *Eliz. Dyer, fol.* 371. *Swin. part.* 4. *sect.* 10.

196. But if the Testator, in either of the Cases, make another man Executor; then the Legatary shall not enter into the whole estate of the deceased but the Executor proving the Will, is to enter, and may receive or sue for all debts due to the Testator, and stand also chargeable with the payment of the Testator's debts and what remains is due to the universal Legatary. *Mich. Graff. the same com. opin. sect. Instit. quæst.* 14. *num.* 3. *Swin. part.* 7. *sect.* 10.

197. If the Testator bequeath to *A. B.* all his moveable goods; here the Legatary may recover all the Testator's personal Goods and Cattel, both quick and dead, which either move themselves, (as Horses, Sheep, Oxen, Swine, *&c.*) or can be moved by another, as Houshold-stuff, Plate, Plough-gear,

Waynes,

Waynes, Carts, Corn in the Barn or Granarys, and also Corn growing on the ground: And such Debts as were due to the Testator, and did arise by reason of such moveable things, and for recovery whereof, there lieth an Action personal, do belong also to the Legatary; but the Legatary cannot sue for the same in his own Name, if another man be made Executor; but the Executor must sue for the same, and after recovery, deliver the same, to the Legatary. *Paul. de Castrens. Consil.* 132. *vol.* 1. *Socin. Jun. Consil.* 60. *vol.* 1. *Stamf.* 45. *Swin. part.* 7. *sect.* 10. *Noyes Max. pag.* 99. *Mich. Graff. thesaur. com. opin. rect. Legat. quest.* 19.

198. But where the Testator doth bequeath to *A. B.* all his Goods immoveable: here the Legatary hath right only to the Leases for years, which did belong to the Testator, and to such benefits as

arise thereby, as fruit on the Trees, Grass growing on the Ground, Fishes in the Pond, and Pigeons in the Dove-coat, as appurtenant to the Grounds demised, or, as parcel of the fruits of the Tenement, (which if they were out of Lease,) did belong to the Heir: but as to Corn growing on the Ground, or other Fruits Industrial, as Hemp, Lyme, &c. Turneps, Carrets, or other Roots; they are accounted amongst the moveable Goods, and such Legatary shall not have them: but he shall have such Debts as were due to the Testator, by reason of something immoveable, as Rents due out of Leases or Arrearages of Rents due out of Lands, Tenements and Hereditaments; but he cannot Commence Suit in his own Name, if another be made Executor, as is shewed before, number 197. *Cowels Interp. verb. Chatels. Kelloway, Rep. fol.* 118. *Stamf. cap.* 16. *fol.* 45. *Mich. Graff. in.*

fam.

laur. com. opin. ſect. Legatum, q. 19. *num.* 5. *Swin. part* 7. *ſect.* 10. *Bro. Executor* 49.

199. If the Teſtator bequeath to thee all his Houſhold-ſtuff; in this caſe, thou ſhalt have all his Tables, Forms, Stools, Chairs, Trunks, Cheſts, Cupboards, Bedſteads, Curtains, Vallens, Rugs, Blankets, and all manner of Bedding; and alſo, Hangings, Carpets, and all manner of Linen, as Sheets, Taple-Cloths, &c. Baſons and Ewers Candleſticks, Salts, Flaggons, Pottingers, Sawcers, &c. Bowls, Barrels, and all manner of Veſſels ſerving for meat or drink, whether they be of Earth, Wood, Glaſs Pewter, Braſs, or Silver, or Gold, if they were uſed in the dayly ſervice of the Houſe, and not kept for Ornament only; and alſo Pots, Pans, Spits, Racks, and the like: and laſtly Coaches by ſome are held to paſs by the name of houſhold-ſtuff. *Mynoch. de præſum. l.* 4. *præſum.*

160. *num.* 8, 16, 17, & 19. *And. Præsump.* 122. *num.* 21. *Panor. Consil.* 88. *vol.* 2. *num.* 3. *Swin. part.* 7. *sect.* 10.

200. But Apparel, Books, Weapons, Artificers tools, Cattel, Victuals, Corn in the Barn or Granary, Waynes, Carts, Ploughs, &c. and Vessels affixed to the Free-hold, do not pass by the name of Houshold stuff. *Menoch. de Præsump. l.* 4. *Præsump.* 160. *num.* 29, & 33. *Labet. and Glos. de Supellectil. Swin. part.* 7. *sect.* 10.

201. If the Testator, having store of young Colts, willeth his Executor to give to *A.B.* two Colts of the age of two years, and after the making of his Will liveth many years in this case, there is due to the Legatary two of the first Colts, which were extant at the time of the Will making, and not of the last Colts at the time of his death. *Franc. Mantica de conject. ult. Volunt. l.* 4. *tit.* 11. *Menoch. de Præsumpt.* 121. *num.*

numb. 6. lib. 4. Swin. part. 7. sect. 11.

202. And, if the Testator bequeath to *A.B.* all his Goods, which are in such a place, and afterwards he brings more Goods thither, and then dies; here the Legatary shall have only those goods which were there when the Will was made, and not those Goods which were brought thither afterward. *Menoch. de Presumpt. 127. num. 29. l. 4. Swin. part. 7. sect. 11.*

203. But, if the Testator had said, I bequeath to *A. B.* all my goods which shall be in such a place, or, all my goods which may or can be found in such place; here all the goods in that place at the time of the Testators death, are due to the Legatary, though they were brought thither by the Testator after the making of his Will. *Franc. Mantica de conject. ult. Voluntat. lib. 3. tit. 11.*

num. 12. *Menoch. de Præſumpt.* 11
num. 87. *lib.* 4. *Swin. part.* 7. *ſect.*
11.

204. If the Teſtator bequeath to *A. B.* his Herd of Cattel, and there is but one left at the time of his death; in this caſe the Legatary can recover no more. *Swin. part.* 7. *ſect.* 11. *Simo. de Prat. de Interp. ult. voluntat. l.* 4. *fol.* 179. *Dubit.* 9. *num.* 45.

205. Where the Teſtator doth bequeath to *A. B.* the Corn in his Barn, and afterwards layeth up more Corn in the Barn, and dyeth before the other be thraſhed; in this caſe, the Legatary can but have only that Corn which was there at the time of the Will making; but if that be all ſpent before the Teſtator's death, then he may recover as much of the new Corn, but no more. *Fulb. fol.* 41. *Plo. Co. fol.* 341. *Maſch. de Probat. Concluſ.* 1280. *num.* 32, 33. *Swin. part.* 7. *ſect.* 11. *Cowels Inſtit.* p. 145.

206.

206. So note, that it appears by these cases, that sometimes the Testator's death is to be taken notice of, and sometimes the making of the Will is to be respected in the recovery of Legacies: but in these and all other Cases, the Testator's meaning is chiefly to be enquired after. *Franc. Mantica de conject. ult. voluntat. lib. 3. tit. 11. num. 22, 23, 24. tit. 19. num. 1, 2, 3, 4. Swin. part. 1. sect. 3. num. 19. and part. 7. sect. 11.*

207. If the Testator bequeath all his clear Goods after Debts paid, &c. to his Brother and his Children; in this case the Father shall have half of the clear goods, and the Children the other half: for it is a Rule, that where divers persons are comprehended under one Name collective with another third person, then all they which be included under that one Name, do represent but one onely person, as in this case, and shall have

but a Moiety amongst them; unless it be proved that the Testator's meaning was, that the Goods should be equally divided among them; or, that he expressed it so in his Will. *Paul. de Castr. sect. Hered. Instit. Franc. Mantica de conject. ult. vol. l. 4. tit. 9. Swin. part. sect. 20.*

208. If the Testator bequeath to the Child in the Mother's Womb an hundred pounds, in this case, if the Mother bring forth two or three Children at that time; the Legacy is to be divided amongst them. *Franc. Mantica de conject. ult. Volunt. l. 4. tit. 8. num. 4. Swin. part. 4. sect. 20. Paul. de Castr. sect. in l. Qui Filiabus.*

209. But, if the Testator say, *If my wife bring forth any Childe, I give to the same an hundred pounds*, here, if she bring forth two or three Children at that time, then every Childe shall have an hundred pounds if the Testator's Goods do suffice.

suffice to satisfie the same; unless it be sufficiently proved, that it was the Testator's meaning, that they should have no more but an hundred pounds amongst them. *Swin. part. 4. sect. 20. num. 17. Text. in D. sect. 1.*

210. If the Testator bequeath to the child in the Mothers womb, if it be a Man-Child, two parts of his clear Goods, and if it be a Woman-child; then the Mother to have two parts of his clear Goods, and the Child but one, and afterwards the Mother brings forth two Children, both a Man-child and a Woman-child; in this case, the Son shall have twice as much of the Testators clear Goods as the Mother, and the Mother shall have twice as much as the Daughter: as for example, the clear goods amount to sevenscore pounds; here the daughter shall have twenty pounds, the mother fourty pounds, and the son fourscore pounds; whereas

if ſhe had brought forth onely a Son, then the Son ſhould have had fourſcore and thirteen pounds ſix ſhillings and eight pence, and the Mother ſix and forty pounds thirteen ſhillings and four pence: and if ſhe had brought forth onely a Daughter, then the Mother ſhould have had fourſcore and thirteen pounds ſix ſhillings and eight pence, and the Daughter forty ſix pounds thirteen ſhillings and four pence. *Franc. Mantica de conject. ult. volunt. l. 4. tit. 9. num. 12. Swin. part. 4. ſect. 20.*

211. But if the Teſtator bequeath to the Child in the Mothers Womb, if it be a Man Child, two parts of his Goods, as aforeſaid, and the Mother one; and if a Woman Childe, then the Mother two parts, and the Child but one; and the Mother brings forth an Hermaphrodite, who hath both the parts of a man and a woman; in this caſe the Hermaphrodite ſhall have only the Portion due to that

Sex

Sex of which the Hermaphrodite doth most participate, and not the Portion due to both Sexes: and if it be doubtful of which Sex it doth most participate, then it shall be presumed according to the more worthy kinde. *Swin. part.* 4 *sect.* 10. *num.* 19. *Co. on. Lit. fol.* 8. *Phillips Pr. of Law. p.* 36.

212. If the Testator give an hundred pounds to the Children of *A.* *B.* who hath four Children at that time of the Will making, and afterwards before the Testators death, *A. B.* begetteth other four Children, so that he hath eight Children in all; yet in this case those four only which were born when the Will was made, shall have the hundred pounds, and the other four shall have nothing out of it. *Simo. de Pratis. de Interpret. lib. Voluntat. lib.* 4. *dub.* 9. *fol.* 178. *Menoch. de Præsumpt. l.* 4. *Præsumptio* 47. *num.* 18.

213. If the Testator bequeath hundred pounds lying in such Cheſt, to *A. B.* and there is no mo ney in the Cheſt; here the Le gacy is void, unleſs the Teſta ſay, I give to *A. B.* an hund pounds, and I will that the ſa be paid out of the Monys which have in ſuch a Cheſt, or of Mony which ſuch a man do owe me; in ſuch Caſe, altho there be no mony in the Cheſt, any due by the perſon named the Teſtator, yet the Legacie is and ought to be paid out of Teſtator's Goods. *Swin. part ſect. 5. num. 5 Mich. Graſſ. theſ com. opin. ſect. Legat. queſtio num. 3.*

214. And where the Teſt doth bequeath ten pounds to *A.* remaining in ſuch a Cheſt, and his death five pounds only is fou in the ſame Cheſt; in this c the Legacie is good for ſo much is found in the Cheſt, and no mo

Sw

Swin. part. 7. sect. 5. num. 15. Paul. de Castr. in D. sect. quinque, num. 9.

215. If the Testator do imagine himself to be indebted to another person, and doth bequeath that debt to the same person which he erroneously supposeth he oweth him, not expressing any sum; in this case the Legacy is void: but if he say, *I do bequeath ten pounds to such a person, which I owe him,* whereas the Testator knows he owes him nothing; yet, in this case the Legacie is due, notwithstanding the false demonstration; and here the Testator is not presumed to err, unless the Executor make proof of error. *Paul. de Castr. in l. 2. C. de falsa causa ad test. Swin. part 7. sect. 5. num. 14.*

216. If the Testator, meaning to give but fifty pounds, doth give an hundred pounds; or meaning to give an hundred pounds, doth give but fifty pounds: in these cases the

the Legatary may recover as mu
as the Testator did mean and
tend to give, be it more or le
then the sum mentioned. *Swin. p*
7. *sect.* 5. *num.* 13.

217. If the Testator bequeath
hundred pounds, to the Church, a
mentioning what Church, it sh
then be understood of his Pari
Church; or, if he name a Churc
and there be divers there of t
same name, and none of them h
Parish-Church; then the Exec
tor, if he prove the Will, or t
Ordinary, if he refuseth, may be
stow the same on which Church h
will; but, if the Testators Pari
Church be of the same name,
ought then to be bestowed ther
Mich. Graſs. theſaur. com. opin. ſe
Legat. q. 64. *Swin. part.* 7 *ſect.* 8. *Fra*
Mantic. de conject. lib. vol. 1. 8. *tit.* 6.

218. Where the Testator doth be
queath one half of his goods to o
person, and makes another his Ex
cutor, willing and appointing th

ll his Goods shall be divided be-
wixt them; in this case, the Lega-
ary shall have half before debts
aid, and the Executor the remain-
er after debts paid: as, where the
estator hath goods to the value of
n hundred pounds, and oweth twen-
y pounds out of the same; here the
egatary shall have fifty pounds,
nd the Executor shall pay the 20
ounds debt out of his half. 5 *Ma-*
e. Dyer fol. 164. *Goldesborough Rep.*
g. 149. *Pl.* 74. *Hil.* 43. *Eliz. C B.*
win. part. 7. *sect.* 10. *Cowel's Inst. p.*
46.

219. If a man bequeath twenty
ounds to *A*, and twenty pounds to
, and twenty pounds to *C*, and make
is Executor, and dies; having
oods in all but to the value of
wenty pounds, of which goods the
xecutor makes an Inventary; in
his case, he may pay which of the
hree he pleases his whole Legacy,
nd the other two are without re-
edy; or, he may, if he please, pay
every

every one of them a rateable pa
and, if in case the Executor m
no Inventary, yet he is charge
no further than the value of
Goods; and so if every Lega
in such case should sue him, t
must prove sufficiency of Goods,
otherwise they should get noth
Plo. com. fol. 545. *in Case inter*
ham and Yardly. Dr. & Stud. li.
chap. 10.

220. If the Testator say, *I*
that A. B. *shall have an Horse*; h
the Election belongs to the Lega
but, if he had said, *I will that my E*
ecutor give to A. B. *an Horse*, t
the Election belongs to the Exe
tor: and, if the words of Electi
be directed to neither of them, t
the Legatary shall make the Elec
on, if there be any such thing
tant amongst the Testator's go
as is bequeathed; and if not, t
the Executor is to make the Elec
on: and in case where the Legat
th

chuseth he must not take the very best, unless there be no more but two of the things extant; for then he may chuse the best, and so he may do when the Testator grants him the Election; and as the Legatary may not chuse the best, neither may the Executor obtrude the worst of those things extant; and where there is no such thing extant, then the Executor is to provide a competent thing for the Legatary. *Mich. Graß. Thesaur. com. opin. sect. [illegible] q. 62. num. 2. and 3. Mim. in sect. si generaliter, num. 6. Swin. part. 7. sect. 10. Co. on Litt. fol. 144. b.*

221. If the Testator bequeath two Horses to two Men, having no more, and one of them is a great deal better than the other; in this case he that is first named in the Testament shall have the Election. *Co. on Litt. fol. 144. b. 2. H. 7, 23. Swin. part. 7. sect. 10.*

222.

222. If the Testator give to twenty pounds if he will, in case *A. B.* must express his willingness by some means, or else the Legacy is not due; and if he die before such expression, then the Legacy is lost, and shall not go to his Executors or Administrators, which otherwise it would, if no such condition had been expressed. *Swin. part. Sect. 6. num. 7.*

223. If an Executor have a Legacy left him by his Testator, and refuseth to stand to the Executorship in such a case he loseth his Legacy. *Gribald. Thesaur. com. opin. verb. Executor. Swin. part 6. sect. 2. in fine. Reg. Eccles. Tit. Testament. C. and 24.*

224. But if the Executor be duly admonished to take the Executorship upon him, then if he be the Testators Kinsman, or such a person to whom the Testator would have given the Legacy, though he do not perform the Will, and take

Of

fice upon him: in ſuch caſe he
ll not loſe the Legacy then, by
refuſal of the Executorſhip;
ther ſhall the Wife loſe her
rds, nor the Children their filial
rtions, nor the Creditor his debt,
ny of them be made Executors,
d refuſe to take the Office upon
m. *Swin. part 6. ſect. 3. num.*
Sichard. in lib. Si legatarius cap.
legat.

225. If a man by his Will deviſe
his Lands and Tenements to *A.*
in this caſe, not only all his
nds and Tenements which the
ſtator hath in poſſeſſion do paſs,
t alſo thoſe which he hath in re-
rſion alſo, by vertue of the word
cements. Terms of the Law, verb.
*viſe, Cowels Inſt. p.*144. *Swin. part*
ſect. 4. *num.* 19.

226. But if the Teſtator have
nds in Fee, and lands in Leaſe, for
rs, and deviſeth all his lands and
tements, in ſuch caſe the lands in
Fee

Fee only paſs, and not the La
in Leaſe for years; but if he ha
none but lands for years
Leaſe only then thoſe lands
paſe by vertue of ſuch deviſe.
7 *Jac. B. R. Roſe and Bartlets C*
Cro. 1 part. Rep. fol. 213. *Noye's*
pag. 99.

227. If lands be deviſed to
man to have to him for everm
or, to have to him and his Aſſi
in both theſe caſes a Fee-ſim
doth paſs to the Deviſee: but
ſuch a Gift or Grant wher made
Deede, it would carry an eſt
but for life, Without the wo
Heirs were in it. *Perkins, ſect.* 5
M. 22 *E.* 3. *Deviſe.* 20. *Terms of L*
verb. Deviſe. Swin. part. 4. *ſect.* 4. *n.*

228. Alſo if a man dev
his lands to another, to give,
ſell, or do therewith at his pl
ſure; here he hath a Fee-ſim
alſo; and if lands be deviſe
one and his Heirs males, this ſh
amount to an Eſtate in tayl; b

ch words be in a Feoffment, it
l be taken for a Fee-simple, be-
se it doth not appear of what
dy the heirs Males shall be begot-
. *Terms of the Law, verb. Devise,*
n Lit. fol. 9. b. Swin. part. 4. sect.
Cowel's instit. pag. 144.

229. Also, if one devise to an In-
t in the Mother's womb, it is
od; but such a Feoffment, Gift,
Grant is void: and, if one will
his son shall have his land after
death of his wife, in this case, the
fe by (the favorable interpreta-
n of such Will) shall have the
nd for term of her life. *Finches*
w, pag. 172. 13 H. 7. 13. Terms
the Law verb. Devise. Cowels Inst.
144. Swin part 4. sect. 4. Noyes
xims, p. 100.

230. If a man devise all his lands in
to his two daughters, and makes
m Executrixes; and afterwards
chaseth more lands in *A.* and
e dies without a new publication
his Will, and expressing of this
land

land newly bought therein; in the
caſe the land newly bought doth
paſs by the ſame Will. *H.* 43. *El.*
B. Beckford and Parncotes Caſe. Gol-
boroughs Rep. p. 150. *pl.* 77.

231. A man having four daugh-
ters, *A*, *B*, *C*, and *D*, deviſes his land
to his Wife for her life, and after
her deceaſe, the ſame to be equally
divided amongſt his Daughters, and
their Heirs; *A.* one of the Daugh-
ters died before the Mother, and
after the Mothers death the heir of
A. ſued for a fourth part, and was
judged for the Heir by vertue of the
disjunctive (or) but if it had been
to have been divided amongſt his
Daughters (and) their Heirs, the
word had altered the caſe, and
would have given the Fee to the
three ſurviving Siſters. *Mich.* 1 *Car.*
1. B. R *Rot.* 189. *Taylor and Hob-*
skies Caſe. Godbolts Rep. fo. 363.

232. If one deviſe his lands to
another Man and his Heirs, and the
Deviſee dieth in the life-time of

the Deviſor, and afterwards the Deviſor dieth; in this caſe, the Heirs of the Deviſee ſhall not have the land. *Plo. com. fol.* 342. *in Brett and Rigdens Caſe.*

233. If a man ſeized of lands in Fee, ſowe the ſame with Corn, and afterwards deviſeth the land to *A. B.* and dieth before the Corn be ſevered; in this Caſe the Deviſee ſhall have the Corn as well as the Land: but it is otherwiſe where the Lands deſcend to the Heir; for the Executors or Adminiſtrators ſhall have the Corn ſown at the Teſtators death. *Mich.* 20. *Jac. B. Spencers caſe, Winches Rep. fol.* 51.

234. A man deviſed his Meſſuage, whereof he was ſeiſed in Socage in Fee, by theſe words: *I deviſe my Meſſuage where I dwelt to my Cozen* H. *and her Aſſigns for eight years, and my Cozen* H. *ſhall have all my Inheritances, if the Law will;* and this was adjudged a good de-

vise in Fee of the Messuage, and by the general words of the Will all the Inheritances pass also. *Mich.* 11 *Jac. C. B. Wedlock and Harding's Case, Godbolts Rep. fol.* 208.

235. If a man devise his Land to the Heirs-Males of any of his Sons or next of Kin, such a devise is void for the uncertainty thereof. *Hil.* 2 *Car.* 1. *C. B. Rott.* 1288. *in Hart & Fishers Case; and Trin.* 1649. *B. R. Rot.* 849. *Beals and Wymans Case. Style Rep. fol.* 240.

238. A man having Lands in Fee simple, and Goods to the value of five pounds only, deviseth to his Wife all his whole Estate, paying his Debts and Legacies, which amounted to forty pounds; in this case, it was adjudged that all the Lands did pass by the Devise, and that the Wife had a Fee-simple in the Lands, the word (paying) enforcing it; for they are to be paid presently, which cannot be if the Land pass not in Fee. *Tr.* 16 J.

R. R. Kirman and Johnsons Case. Styles Rep. fol. 293. and see 29 H. 8. Bro. Testament. 18.

237. *A.* seized of three Houses, and other Lands, Pastures and Medows in *W.* in the County of *H.* and of Land in the County of *O*, divised in this manner, *viz. I give my Capital Messuage in the County of O, and all other my Lands, and Medows, and Pastures in the Parish of W. to such an one*; and adjudged here that the house passed by the devise; for that *Lands* comprehends houses also. *Ewer and Heydons Case. Abr. Mores Rep. pag. 103. pl. 468.*

238. If a man devise the profits of his Lands, it is a devise of the Lands themselves. *Tr. 16. Jac. C. R. Rott. 465. Balder and Blackburnes Case. Brownlow 1. part. 79. Owens Rep. 66. Tr. 23 Car. Styles 21.*

239. A man by his Will devileth his lands to his wife; and if she

have Issue by the Devisor, that his Issue shall have it at his age of twenty one years; and if the Issue die before that age, or before his wife; or if she hath no Issue, that then she shall chuse two Attorneys, and she to make a bill of Sale of any lands to her best advantage: In this case it was resolved, that the wife hath those lands for life, and she having no Issue, hath not any interest to dispose, but hath an autority to nominate two who shall dispose of the lands, and they shall make sale of them. *Mich.* 5 *Jac.* B. *R. Beal and Shepherds case. Bro. 2 part Rep. fol.* 199.

240. I might go on to shew what words in a Devise make a Condition, and what a Limitation, and where an estate shall pass by Implication, and what words make an estate Tayl, Fee-simple, or for Life; and where the Devisees shall be Joynt-tenants, and where Tenants in Common, with several

other things; but it not being the intent of this Treatise, I refer the Reader to the learned Reports now extant, where he may be satisfied: and so I return again to my purpose.

241. Devises and Legacies are to be sued for in the Ecclesiastical Court, but the Ordinary cannot take Cognizance of Fees or Freehold devised; but a Prohibition will lye, if any Judge of any Spiritual Court shall cite one before him in case of such a devise as intrencheth upon the Common Law. *Perkins, sect. 576, 579. and Dr. and Stud. li. 2. chap. 55. Cowel's Inst. p. 146.*

242. Note, there may be much deceit used by a knavish Executor; and though the Goods be of a great value after the Debts are paid which were truely owing and due by the Testator, yet he may keep the Legacies, and never pay them perhaps, but pretend that all the

Debts are not paid, and thereupon may cause Strangers to sue, and then alledge that there are more Suits against them, than the Goods of the Testator are sufficient to satisfie, or, they may confess the Action brought against them, and several other wayes there are whereby they may defraud the Legatee of their Legacies. Therefore it were good for Testators in their life-times, either to secure the Legacies to the Legatees by some sure means, or otherwise, in their life time to deliver the same that they see them possessed thereof, and not leave it to the Will of the Executor. *Perkins, sect.* 571.

CHAP.

CHAP. IX.

Several Cases concerning the duty of an Executor.

243. THere are three kinds of Executors, or persons which have to deal with the Execution of dead mens Wills, and disposition of their Goods: The first hath his Authority from the Law, and that is the Bishop or Ordinary of every Diocese, who hath the execution thereof, when no Executor is appointed by the Testator, or, where the Executor doth refuse to take the Office upon him. *Jo. de Cambus, Tract. de Executoribus, ult. Volunt. part.* 1. *q.* 3. *Swin. part* 6. *sect.* 1. *num.* 2.

244. The second hath his Authority from the Bishop or Ordi-

dinary, and is he whom we call an Administrator, and is put in where the Executor named refuseth, or cannot be Executor, or when no Executor is named in the Will; and if there be a Will, then it must be annexed to the Letters of Administration: and such Administrator is chargeable with the performance of the Will, as if he had been appointed by the Testator. *Cro. Testament* 20. *and Devise* 35. 31 *E.* 3. *cap.* 21. *&* 21 *H.* 8. *cap.* 5. *Swin. part* 6. *sect.* 1.

245. And lastly, the Executor who derives his power from the Testator, is he that is named Executor in the Testament; to whom the Execution of the Testament is committed by the dead man, and is called *Executor Testamentarius*, and hath his Authority immediately from the Testator, and may without the Authority of the Ordinary enter to the Testator's Goods and Chattels; and after Probation of the

the Testament, may also Commence Suit against the Testator's Debtors. *Plo. com. in Case inter Grisby & Fox. Bro. Executor 49. Swin. part. 6. sect. num. 4. Minsin. in tit. de Hared. Inst.*

246. When the King is made Executor of the Testament of another person, he doth not take the office upon him, but appoints certain persons to take the Execution of the Will upon them, (against whom such as have cause of Suit may bring their Action) and others he appoints to take the accounts, as appears in the Case of *Catherine* Queen Dowager of *England*, Mother to *H. 6.* who constituted King *H. 6.* her sole Executor; and he appointed certain persons to take the charge of the Will upon them, and others to take their Accounts. *Vide Rot. Parliament.* 15 H. 6. *num.* 32. *Co. 4. part. Instit. fol.* 335.

247. When a man makes several

Executors, and they live in divers Dioceses, they shall all receive such benefit as accrues to them by the Testament, only by the Authority of that Judge who confirmed the Testament to them; and the same course is to be taken by the Administrators who live in several Dioceses. *Refor. Leg. Eccles. Testament. f.* 137.

248. Now the Office of an Executor Testamentary doth consist in two things, that is, either in accepting or refusing the Executorship, upon both which parts there are several Cases hereafter following in this Chapter, very necessary for all Executors to know.

249. If he that is named Executor be cited to appear before the Ordinary, and do refuse to accept the Executorship, or will not appear, then the Ordinary or other Judge may commit the Administration of the Goods of the deceased, as if he had died Intestate

state: but if the Executor afterwards be willing to undertake the Executorship, then the Ordinary may revoke the Administration before Committed: but mean acts done by the Administrator, until the Executor undertake, are good and effectual in Law. *Bro. Exer.* 49. *and* 101. *and Admin.* 32. *and* 33. 31 *H.* 8. *cap.* 5. *Vide Griesby and Foxes Case, Plowd. com. fol. Swin. part.* 6. *sect.* 2.

250. Note, that the Executor cannot be compelled to undertake the Office, unless he have already medled with the Testator's Goods as Executor, for then he may be compelled to it: and if notwithstanding he do still refuse, and the Ordinary do commit the Administration to him; this refusal is void, and he shall be charged as Executor. And when one shall be said to meddle with Goods as Executor, and when not, is shewed afterwards

terwards in this Chapter. *Fitz. Abr. tit. Exec. num.* 35. *Olden de Exec. ult. voluntat. tit.* 7. *in fine. Swin part* 6. *sect.* 2. *Noye's Maxims, pag.* 101. *Hernes Law Convey. pag.* 87.

251. Where a term is devised to an Executor, who enters and dies before Probate; yet in such Case the Entry is good Executorship, and his Administrator shall have it. *Pl.* 22 *El. Dyer, fol.* 367.

252. Note, that every one to whom the Testator was indebted, shall have an Action against the Executor so long as the Executor hath Assets in his hands; but a debt due to the Testator shall not charge the Executor as Assets till he have received it. *Terms of the Law, verb. Executor. Br. num.* 112. *Swin. part* 6. *sect.* 3.

253. Where there be divers Executors, the Actions Commenced by them ought to be in all their names; and so must the Action that

is commenced against them, name them all; except it be in Case where some of them refuse to take the Office, and the others onely prove the Will; for, in such Cafe, in Actions brought against them, those onely which prove the Will may be named, and the others left out. *Bro. Exec.* 117. *Co. 9. lib. Rep. fol.* 40. *Noyes Maxims, pag.* 102. *Swin. part. 6. sect.* 20. *Perkins, sect.* 485.

254. If divers be made Executors, and some of them refuse, yet he which refuseth may release any debt (before Judgment) which was due to the Testator; and it is as good as if he had never refused, and so a sufficient discharge to the Creditor; for every Executor hath an entire interest; and therefore, if two as Executors have a term, and one of them grants all that to him appertains; in this case the entire Terms shall pass. *Co. 5. lib. fol.* 28. *De Exec.* 38, 117. *Dyer, fol.* 23.

and

and 319. *Swin. part* 4. *sect.* 20. *Ne*
Maxims, page 101, 102. *Perkins, se*
485.

255. But one Executors releas
of Debts, or selling of Goods, sha
not charge the other to pay so muc
of the Goods, if there be n
enough to pay debts; but it sha
charge the party himself that did
release or convey. *Hernes Law Co*
vey. p. 87.

256. Note, that the Execut
which refuses may joyn at a
time when he will; yea, though
be not till after the death of the
ther Executor, who prov'd the Wi
contrary to the opinion of *Brok*
and so the Quere in *Dyer* is well
solved. 42 *Eliz. Henslowes Ca.* 9
fol. 39. *Perkins, sect.* 485. *Dyer.*
360. *num.* 42. *Bro. Exec.* 9. 99,
149. *Swin. part* 4. *sect.* 20. *and*
6. *sect.* 3.

257. But if divers be made Ex
cutors, and they all refuse bef
the Ordinary, and he gr

dministration to another; in ch case they cannot then after- eeds prove at any time: so note, e diversity between one refusing, d all refusing. 42 *El. Henslowes Ca.* 9. *l. fol.* 39. 36 *H.* 6. *Finches Law,* 17. *And Vide Bewacorne and ers Case, Mores Rep. fol.* 258. If two be appointed Execu- ors, and one of them refuses, and e other takes the Office upon im, and then dies and makes his estament, wherein he names the xecutor; in this case the Execu- or of the Executor cannot joyn ith the surviving Executor, nei- her in the Execution of the first estators Will, nor in Suits or Ac- ons: and if the Executor of the xecutors have any Goods in his ands of the first Testators, the sur- iving Executor may have an Acti- n against him for the same; and if he surviving Executor do after- ards die intestate, yet cannot the xecutor of the Executor meddle with

with the Goods of the first Tes
tor; but Administration thereof
to be committed to the next of
to the Testator; and if the Exec
tor of the Executor, or who
first, meddle with the Goods,
he may be sued by the Creditors
Executor in his own wrong. *Bro.*
cut. 92, 99, 149, 160. *Swin. part*
sect. 20.

259. If one make another
Executor, and dieth; and the
ecutor before he had proved
Will, maketh another his Exec
tor, and dieth; in this Case A
ministration of the first Testat
Goods, with the Will annex
shall be committed to the nea
Kin of the first Testator, and
to the Executor of the Execut
unless the first Testator did bequea
his Goods (as his Debts, Funer
expences, and Legacies paid) to
Executor named in the Testamen
and then in such case the A
ministration of the first Testat

Goo

Goods is to be committed (with the Will annexed) to the Executor of the Executor. *Dyer, fol.* 372. *num.* 2, *M.* 23. *El. Iſted. Ca. Swin. part.* 6. *ſect.* 3.

260. Note, that if divers be appointed Executors, and one of them both ſell ſome of the Teſtators Goods for a ſum of Money; then that Executor which ſold the Goods may ſue alone for the money due for the ſame. *Swin. part* 4. *ſect.* 20. *Exec. num.* 65.

261. Where divers perſons are made Executors, and the Teſtator gives them power to ſell his Lands: in this caſe, though ſome of them die, or do refuſe the Executorſhip, yet the others who take upon them the charge and burden of the ſame Teſtament and Will, may ſell the Lands, except in ſome Caſes. *Perkins, ſect.* 545. *Paſch.* 46 *E.* 3. *Deiſe* 8. 21 *H.* 8. *cap.* 4. 39. *Aſſ. pl.* 17. *Co. on Litt. fol.* 113. *Swin. part* 6. *ſect.* 3. *Dyer, fo.* 371. *See Howel and*

and Barnes Case, Mich. 10 *Car.* *Cro.* 1 *part.*

262. As, where the Testa[illegible] deviseth, that after his death [illegible] Lands shall be sold by his Exec[illegible]tors, with the assent of *A. B*; m[illegible]keth his Wife and a Stranger [illegible] Executor, and dieth, and th[illegible] the Wife dieth, and *A.B.* also, [illegible] this Case the Authority of selli[illegible] the Lands is extinct, and gone [illegible] the death of *A. B.* without wh[illegible] consent it cannot be sold; and the[illegible]fore, if the surviving Execu[illegible] should sell, such sale is void. *Bro[illegible]lowes* 2 *part Rep. fol.* 100. *M[illegible]* 5 *Eliz. Dyer fol.* 219. *Fulb. fol.* [illegible] *Swin. part* 9. *sect.* 3.

263. But if a man devise by [illegible] Will, that *A. B.* and *C. D.* whom [illegible] makes his Executors, shall sell [illegible] Land for paiment of his debts, [illegible] they refuse to be Executors; [illegible] notwithstanding they may sell [illegible] Lands, because they are named [illegible] their Proper names; or, if one [illegible]

Executors dieth, and the other
eth upon him the Executorship,
afterwards selleth the Lands,
sale is good. 15 H. 7. 12. Per-
, sect. 548. 19 H. 8. 9. Swin.
6. sect. 3.

164. But where a man by his
maketh M. & C. and D. his Ex-
ors, deviseth his lands to the said
and D. by their special names,
to their Heirs, and further de-
eth that the Devisees shall sell his
ds for payment of his debts, and
of the Executors refuses to in-
eddle; in this case it hath been
d that this being a special and
nt interest, the other three Exe-
tors cannot sell without their
mpanion. Mich. 29 Eliz. B. R.
nisant and Sir Rich. Greenfieles
e. Godbolts Rep. fol. 77. And see
El. B. R. Vincent and Lees case.
n Litt. fol. 113.

165. My Lord Cooks advice is
such who devise by their Wills
Lands to be sold, that they
make

make it as certain as they can; that the Sale be made by his Executors, or the Survivor or Survivors of them, if his meaning be so; or by such or so many of them as take upon them the Probat the Will, *&c.* and it is better give them an Authority then Estate: unless his meaning be should take the profits of the L in the mean time; and then necessary that he deviseth that mean profits be Assets in hands; for otherwise they not be Assets. *Co. on Lit.* 113.

266. If a man devise his L to be sold by his Executors, and distribute the Profits to Pious yet after the death of the Test the Inheritance shall descend to Heir, and shall remain in him til the Executors sell the same, the Heir ought to receive the fits thereof till the time of sale: but if the Testator devis

nds to his Executor, which he
lleth to be sold, and the money
be distributed to pious uses, here
Executors after the Testators
th shall receive the Profits and
t the Heir; for in the first case,
Executors have only an Autho-
y to sell, and in the last case they
ve the frank-tenement. *Brownl.*
part Rep. fol. 136. *Noyes Max.*
100, 101. 38. *Ass. Pl.* 3. *Per-*
sect. 541, *and* 543. *Swin. part*
sect. 3. *num.* 7. *Comels Inst. p.*
467. Note, that the Executor of
Executor cannot sell the land of
first Testator, who by his Te-
ment gave power to his Execu-
to sell the same, but it shall go
the Heir, unless the Will be o-
erwise. *Bro. Tit. Executor* 3. *Per-*
sect. 507, 554. *Swin. part* 6.
3. *num.* 11. *in fin.*
468. If a man willeth that his
ecutors shall jointly sell his
nd, or that his Executor and
his

his Feoffees shall joynely sell Land; in such case, if one Executor sell to one, and the other to other; or if the Executors sell one, and the Feoffees to another and afterwards they joyn in sale a third person, in such case the sale is only good, and the void. *Perkins, sect.* 546, 553.

269. If a man willeth his shall be sold for the payment of debts, and expresseth not by whom shall be sold, then the Executors shall sell it: but if he willeth Land to be sold, and expresseth not whom, nor for what; in such it hath been held that such Devise is void, and the Land shall not sold but descend to the Heir. *kins, sect.* 547. 15 *H.* 7. 12.

270. The Executors or Administrators of Tenants in Fee-simple Fee-Tayl, and Tenants for term life, of Rent-services, Rent-charges, Rent-seeks, and Fee-farms, the *Stat.* of 32 *H.* 8. may either

in or have an Action of Debt
inſt ſuch Tenant as is behind,
d in Arrear to the Teſtator at
ſame time of his death, for
h Arrearages of Rent as ought
have been paid to the Teſtator in
life-time; and if the Tenant
o was in Arrear be dead, then
y may have an Action of Debt
inſt his Executors or Admini-
rators for ſuch Arrearages. The
sband alſo who is ſeized in right
his Wife of any Eſtate in Fee-
mple, Fee-tail, Fee-farm, where
y ſuch Rents are behind in the
ives life (whether it be before
after Marriage) and unpaid at
e time of her death, may have
e like remedy, and ſo may his ex-
utors or adminiſtrators. *Co. on Lit.*
351. *b.* 32 *H.*8. *c.*37 *Swi. part* 6. *ſe.*3.
m. 8. *Paſc.*23 *Eliz. Dyer fol.*375.

171. Actions of Account were
iven to Executors by the *Stat.* of
Marlm. 2. and Actions of Treſ-
s done to their Teſtator, as

for

for his Goods and Chattels carri
away, were given by the 4 *E.* 3
and by the 25 *E.* 3. Executors
Executors have Actions of Deb
Account, and of goods carried
way of the first Testators; and
ecution of Statute-Merchants
Recognizances made to him,
are also liable to the Actions
those to whom the first Testa
was indebted, so far as the goo
of the first Testator will extend
but the goods which did belong
the first Testator shall not be
in Execution for the Debt of
second Testator. *Wingates Abr
Stat. tit. Executor. Co. 2. part. In
fol.* 404. *Finch. pag.* 173. *No
Maxims, pag.* 102. *Westmin. 2. c.
25 E. 3. cap.* 5. 4 *E. 3. cap.* 7. *Sw
part. 6. sect. 3. Plo. Com. fol.* 28
287.

272. Note, that one Execut
cannot sue another for the posse
on of the Testators goods; for
possession of one is as the posse

both, and therefore one of them hath no remedy against the other but in Chancery, unless there be a Legacy left unto one of them in particular, and then he may sue for that. *Swin. part* 4. *sect* 20. *num.* 14. *Bro. Exec.* 98. 104. *F. N.B.* 122. 32. *Plo.Co. fol.* 343. *Swin. part* 6. *sect.* 3. *num.* 20. *Tothils. Rep.* 78. 8.

273. If an Infant be made Executor, Administration *durante minori ætate* may be commited to the Mother, or other friend of the Infant, which shall cease and be void when the Infant comes to the age of seventeen years. 41, 42 *El.C.B. Princes Case, Co.* 5. *lib. fol.* 29. *Noys Max. pag.* 105.

274. But this Administrator during such Minority, cannot sell or alienate any of the Goods of the deceased, unless it be upon necessity, as for the payment of the deceased's Debts, or that the Goods would otherwise perish; for he

hath his Office of Administra
Pro bono & commodo Infantis,
not for his prejudice; and can
pay Legacies, unless there be A
tets to pay debts; neither can
let a Lease for a longer time t
whilst the Executor shall be un
age. *Noys Max. p.* 109. *Ca.*
Rep. fol. 29.

275. If a man make two E
cutors, one of seventeen years
age, and the other under; in
case Administration during the
nority of the other is void, beca
he of seventeen years of age m
execute the Will; and therefo
if such Administrator should b
any Action, the Executor of sev
teen years of age may well rele
the Debt. *Piggot and Glasco*
en. Brownl. 1 *part. Rep. fol.* 46.

276. And if a woman u
the age of seventeen years
made Executrix, and the Adm
stration is committed *durante*
ri etate, and then she takes an

of full age; in such case the administration shall cease. *Co. 5. Rep. fol. 29.*

277. An Infant-Executor upon payment or satisfaction to him of all of the Testators debts, may give discharge for the same; and it is good bar against him afterwards: but if he should give a release without payment or satisfaction: in such case he is not barred from the recovery thereof afterwards by such release. *28 El. B. R. Russels case. 5. lib. fol. 27. Tr. 13 Car 1. B. R. Overton and Lathams case. Cro. Jac. Rep. fol. 352, 353. Noys Max. 106.*

278. If a Woman during the Coverture be named Executrix, she alone can neither sue nor be sued without her Husband; but, she alone may do any extrajudicial Act, as the paying of Debts or Legacies, the receiving or releasing of Debts due to the Testator; and so may her Husband alone

without her, though she alone
Executrix; which Acts of
shall not only binde her dur
Marriage, but after also, if she
live him. *Co. 5. lib. fol. 27. F. N.*
Exec. 23. 30. Bro. eod. tit. num. 1
151, 152, 178. *Kellowayes Rep.*
127. *num. 74. Swin. part. 5. sect.*
part 6. sect. 3. num. 17.

276. An Executor may rele
an Action before Probat, altho
that before Probat of the Will
may not have an Action; but if
releasse, and after take Admi
stration, that shall not bar him
the right of Action was not in
at the time of the Releasse, as it
in the Executor. 1 *Jac.* C. B. *Mid*
tons case. Co. 5. lib. fol. 28. Pert
sect. 482. Tr. 7 H. 4. Glan. l. 7.
Fleta, lib. 2. chap. 27. Co. on
fol. 292. b. 18 H. 6. 23. Hernes
of Con. pag. 86. Cowels Inst.
119.

280. If an Executor take in
Testators Bond from one of

Creditors, and gives his own Bond
the mony; or, if the Teſta-
's Creditors be indebted to the
ecutor in ſo much as the Teſta-
was indebted, and the Executor
leaſes to him: in both theſe Ca-
it is a good Adminiſtration by
Executor, and they ſhall not
charged as Aſſets in his hands,
though in the firſt Caſe he get a
nger day of payment. *Paſch.* 30
C.B. *Stampe and Hutchings caſe.*
nards Rept. 111, 112. *See Bry-*
and Goddards caſe. Hob. Rep.
250. *And Arluſh and Col-*
n's caſe. Claytons Rep. p. 88.
148.

281. But if the Executor plead
lly adminiſtred, and give in evi-
ce Bonds cancelled and taken
or Acquittances for Money;
is will not ſerve, unleſs there be
oof of real paiments, made upon
h Bonds and Acquitances, or of
w ſecurity given. *Lent-Aſſize,*
Car. 1. *apud Eber. Scotts caſe.*

Claytons Rep. pag. 112. *pl.* 193.

282. If there be divers Execu-
tors, and they are all sued, and o
of them only pleads, yet Judgme
shall be against them all, but t
costs shall be against him whi
pleads, if the other do confess
suffer judgement to go by defau
Brownlo. 2 part pag. 274. 17 *E.*
45. *b. And see Tr.* 10 *Jac.*
Rans. Lawry and Aldreds case. Brow
lam. 2 part Rep. fol. 183, 184, 18
186, 187.

283. If an Executor be sued
one of the Testator's Creditors, a
he plead fully Administred, and t
Jury finds Assets in his hands
though they be but to a small va
lue, yet he shall be condemned
the whole debt because of his fa
plea. *Mi.* 4 *Jac. B. R. Mary Ship*
Case, Co. 8 *l. fol.* 134. *Clerk of*
Assize. pag. 65.

284. If the Executor promise
pay a Debt of the Testator's, t
shall binde him, though he ha

not assets. *Summer-Assize 16 Car. apud Ebor. Smiths case, Claytons Rep. p.* 85. *pl.* 141.

285. An Executor is not chargeable with a collateral promise made by the Testator, unless there were a breach of it in the Testators life-time. *M.* 1649. *Christopher and Homes case. Styles Rep. fol. And Pasch.* 1650. *B. R. Styles Regist. Practicale, p.* 121.

286. If the Creditor make his Debtor his Executor, in this Case the Debtor proving the Will, the Debt is thereby extinguished: or, if the Creditor make his Debtor and another Executors, here though the Debtor die before he Administer as Executor, the other Executor who was not indebted surviving; yet in this case the surviving Executor shall not have an Action for the same debt against the Executor of his co-Executor; for that the Action was extinguish-

by conſtituting him Executor; and *Actio ſemel extincta, nunqnam revi-viſcit. Quare. Bro. Teſtam.* 178. *Plo. com. fol.* 184. *Cowels Inſt. pag.* 207. *But See M.* 31 *Eliz.* in *B. R. Croſman and Reas caſe, to the contrary, Leonard Rep. fol.* 320.

287. Alſo if two be bound in a Bond to one in a certain ſum of money, and the Obligee makes one of the Obligors his Executor: this is ſaid to be a Releaſe in Law of the Bond and Debt: for the Action is ſuſpended, and a perſonal Action once ſuſpended is thereby extinct. *Hil.* 11. *Jac. C. B. Fry and Gildridge ca. Hop. Rep. fol.* 10.

288. If a Debtor makes his Creditor and another Executor, the Creditor if he do not prove the Will nor adminiſter, may have an Action againſt him that doth prove the Will for his debt; and then afterwards he may Adminiſter and take the Executorſhip upon him

when he pleaſes; but if he take it upon him before he ſue for his debt, his Action will be thereby extinguiſhed.

389. If the Executor by the Will be to pay money, and no place is appointed, the parties in this caſe to whom it is to be paid, muſt make Requeſt to the Executor to pay it, for the Executor in ſuch caſe is not bound to ſeek the parties all over *England*, as it is in the caſe of a Bond where no place of payment is appointed. *Brownl. 2 part Rep. fol.* 46.

390. If one be bound in an Obligation with condition to pay twenty pounds to ſuch perſon as the Obligee ſhall name and appoint by his laſt Will and Teſtament, and the Obligee afterwards makes his Will, and nominates none to whom the twenty pounds ſhall be paid; in this caſe the Executor named in the Teſtament, may ſue and recover the money. *M.* 11

Jac. C. B. Rott. 945. Pease and Silman against Mead. Brownl. 1 part. Rep. fol. 77.

291. As to the paiment of debts by the Executor, he must have a care to pay them according to these following rules; otherwise it may be he shall be forced to pay some of the Testator's debts out of his own proper goods, if there be not sufficient goods of the Testator to pay all the debts; therefore observe what follows.

292. First, Funeral-expences, Debts to the King's Majesty, then Judgments must be paid; after them Statutes-Merchant and Recognizances, then Obligations, and if there be divers Obligations, he may pay which of them he pleases first; unless the day of payment in one Obligation be past, and the day of payment in the other Obligation not come; for then that is to be paid first where the day of paiment is past; or unless one Obli-

gation

gation be put in suit, and the other not, for then that in suit must be first paid: and if there be two Obligations put in suit by two Creditors against the Executor, then he which first gets Judgment must first be paid; and in this case the Executor, if he will, may suffer Judgment in that which was last put in suit, and so pay him off first: then after these Obligations, simple Bills are to be paid; then Rents in arrear by the Testator; then Servants and Head-Workmens Wages; then Merchants Books; and lastly, Contracts by word, in which the Testator could not wage his Law, upon which the Executor may be sued in an Action upon the Case, upon the promise of the Testator. *Bro. Execut.* 172. *Dr. and Stud. l.* 2. *c.* 10. *Dyer fol.* 32. *Mag. Charta c.* 18. *Co.* 2 *part Inst. fol.* 32. *Cowels Inst. page* 150, 151. *Herns Law con. pag.* 87. *Noyes Maximes. pag.* 104. *Co.* 3 *part. Inst. fol.* 202.

202. *Swin. part 6. sect. 16. See* 32 *El. C. B. Pemberton and Barhams case, and* 43 *El.* B. R. *Bearblock and Reads case, vouched in the Sadlers case, Co.* 4. *lib. and Harrisons case,* 40 *El. C. B. Co.* 5. *lib. fol.* 28. *Terms of the Law, ver. Executor. Bro. Exer.* 33, 87, 127, 163. *Mich.* 9 *Jac.* C. B. *Puncheon and Legates case. Brown.* 2 *part Rep. fol.* 317. *and Co.* 9. *lib. fol.* 86. *the same case. M.* 42, 43 *El.* B.R. *Littleton and Hebbens case, Cro.* 1 *part Rep. fol.*

293. The Executor is not chargeable for a Trespass done by the Testator, nor for his receit for rents, nor for occupation of lands, as Bayliff or Guardian in Soccage; for this is no duty certain. *Noys Max. p.* 103.

294. If the Executors or Administrators have not Assets in their hands to pay all the Creditors, according to these former Rules; then they must pay in order as far as the Goods and Chattels of the

Testator

Testator will extend, and the rest are without remedy: but if they pay Debts to others before Debts to the King, or Bonds before Judgments, or Shop-Books before Bonds, *&c.* then they must pay the same over again, if there be not sufficient left to pay them who ought to have been paid according to the same order, and were omitted. *Hernes Law Conv. p. 87.*

295. If the Testator were indebted to the Executor, he may allow his own Debt before he pay other Creditors, to whom the Testator was indebted in the like manner as he was to the Executor, be it by Statute, Bond or otherwise: in case he have made an Inventary, and that he be not Executor of his own wrong; for every Creditor by such means, when the Goods be not sufficient to pay all, would strive to make himself Executor of his own wrong, to satisfie himself, and bar others: an Administrator also may

stop

stop his own debt. *Plo. com. in Wood-ward and Darcyes case. M.* 4[illegible] *El.* B. R. *Coulters case. Co.* 5 [illegible] *fol.* 30. *Ma.* 6 *Iac. C. B. Alexander and Lambs case. Brownl.* 1 [illegible] *Rep. fol.* 103. *Swin. part* 6. *sect.* 1[illegible] *Plo. com. fol.* 184.

296. If the Testator be indebted to one in forty pounds, and the Executor pays but twenty pounds and gets an Acquittance for the whole forty pounds; yet this Acquittance shall not prejudice any other Creditor but for twenty pounds only; and the other twenty pounds shall be Assets in the Executors hands still. 8 *Iac. C. B. Turners case, Co.* 8. *lib. fol.* 13[illegible] *Bro. Exec.* 6. *Swin. part* 6. *sect.* 16.

297. If a man devise his lands for three years to his Executors for the paiment of his debts, this shall be assets in the Executors hands: but, if a man devise his lands to be sold for the paiment of

debts it is no assets till it be ...ld, unless he express it to be so ... his Will. *Pasch. 9 Jac. C. B. ...wnl. 1 part. Rep. fol. 34. Hil. 10 ...c. C.B. Brownl. 2 part fol. 47.*

298. If a man make a Lease for ...ars of a House, *&c.* reserving ...nt, and the Executors after the ...stators death receives the Rent, ...t it is no assets in their hands; ...r the whole Rent belongs to the ...eir. 20 *El. Dyer, fol.* 362. *Plo. ... fol.* 114. *and* 259.

299. If an Executor or Administrator make gain of the Testators money, that gain shall be assets in his hand, *Brownlows 1 part Rep. fol.* 77.

300. If an Executor Pay Funeral-expences, or debts of the Testators with his own money, he may retain goods of the Testators to the same value, and they shall not charge him ... assets in his hands. *Claydon and Spencers case, Mores Rep. fol. pl.* 3. *Barnes Law Con. pag.* 88. *Noyes Max.*

pag. 104. *Swin. part* 6. *sect.* 16. *Dyer, fol.* 2. *and fol.* 187.

301. Note, where it is said before *pl.* 284. that an Action lies against an Executor; upon his promise to pay a debt of the Testator's; yet there ought to be a good consideration to ground the *Assumpsit* upon, which must either be an advantage to the Executor, or a damage to the Creditor, (as forbearance till such a time, *&c.*) or else the Action will not hold. *M.* 2 *Jac. B. R. Fisher and Richardson case, Cr.* 2 *part Rep. fol.* 47. *& P.* 10 *Jac. B. R. Booth and Cromptons case Cro.* 2 *part fol.* 613. *and H.* 16 *Jac. Bogge and Melins case. Huttons Rep. fol.* 27.

302. If Judgment be given against Executors, and upon a *Fieri facias* the Sheriff returns *Nulla bona*; in such case the Plaintiff may have another special Writ of *Fieri facias* directed to the Sheriff, that he levy the Debt of the Testator's goods,

goods, and if it appear to him that the Executors have wasted the goods, then that he levy the same of the Executors own proper goods. *H.* 45 *El.* B. R. *Pettisers case. Co.* 5. *lib. Rep. fol.* 32. *and Cr.* 16 *Car.* 1. B. R. *King and Hil- s case. Cr.* 1 *part Rep. fol.* 38.

303. A man was bound in an Obligation with condition for the performance of Covenants, and dies, after whose death his Executors break Covenants, and the bond being sued, it was moved that Execution might be of the Executors own goods, because the breach of the Condition was the Executors own Act. But the Court denied it, and Judgment was entred *de bonis Testator. Tr.* 17 *Jac.* B. *Rott.* 1849. *Castilion and Ex- of Smiths case. Hobarts Rep. fol.* 83.

304. If an Executor or Administrator be sued for a Debt of the Te-

Testators, and he knoweth of
Iudgment, or other debt upon
cord against the Testator ; if
Executor have no more goods
will satisfie the same, then he
well plead this special matter, and
shall bar the party that sues, for
shall be taken for a *plene Admi-*
stravit : and if the Executor shou
pay the party that sues before
Judgment, it will be a *Devastav*
and he will be forced then to p
the Iudgment out of his own pro
per goods, as is shewed before,
292, *Hil.* 7 *Ed.* 6. *Dyer fol.*
P. 12 *Iac.* C. B. *Moon and Andr*
case, Hobart Rep. fol. 133. *Tr.* 15
C. B. *Rot.* 2119. *Kydd and Chyne*
ca. Hob. Rep. fol. 218. *Scarles ca.*
Mores Rep. p. 191. *pl.* 877. *and Bar*
claughs c. Clayt. Rep. 65. *pl.* 112.

305. If an Executor be not mi
ed to take upon him the Offic
Executor, then it behoves him
to meddle with any of the Te
tors Goods; for, if he once Ad
nis

of the Goods of the deceased, and make use of them by selling the goods, or killing any of the Cattel; or, if he pay any of the Testators debts, or receive any debts due to the Testator, and give acquittances for the same, with other like acts; in such Case he shall be said to Administer as Executor, and may be compelled to stand to the Executorship. *Hil. 8 C. B. in Wickenden and Thomas Brownlows 2 part Rep. fol. 58. Ex. 49. Fitz. Exec. 38. Stokes Porters case, Mores Rep. fol. Max. p. 102. Tr. 13 Eliz. C. B. Robins and Laws case, Leon. Rep. fo. 33. Swin. part 6. sect. 22. Porters case. Dyer, fol. 166.* 306. If a Stranger who is neither Executor nor Administrator enter upon the Goods, aforesaid; this shall charge him as Executor of his own wrong, and he may be sued by the Creditors of the person deceased but

but after the Will is proved, or Adminiſtration granted, and the have intermeddled with the Goods then the Stranger cannot be ſued becauſe there is another Executor of right, againſt whom the Creditor may bring his Action, and chargeable as far as thoſe Goods will extend, which are come to his hands after he hath aſſumed upon him the charge of the Executorſhip: but notwithſtanding all this, that there be an Executor which doth Adminiſter, yet if the Stranger will ſtill take the Goods and claim to be Executor, and pay debts or legacies, or receive debts in ſuch caſe it is ſaid he may be charged as Executor of his own wrong, although there be another Executor of right. *Quia os ſuum contra ſe aperuit nam expreſſa nocent, qua tacita non nocent.* 2 *Iac. C. B. Reads caſe.* C. 5. *l. fol.* 33, 34. *Swin. part* 6. ſect. 22. *M.* 3 *Car.* 1. *Whitmore and*

case. Cro. 1 part Rep. fol. Vide Fr. 12 Iac. C. B. Rott. 4087. Keeble and Oſhaſtons case. Hoberts Rep. fol. 40. And Chandler and Thompſons case 262. Bro. 2 part Rep. fol. 185.

307. Note, that an Executor of his own wrong is chargeable no further then the value of the Goods which come to his hands, and with which he hath intermedled. Brownlows 2 part Rep. fol. 185. Mich. 23 Car. 1. B. R. Styles Repraſticale, page 120.

308. If a man do onely perform deeds of charity, as to feed the cattel of the deceaſed, leſt they ſhould periſh, or take into his cuſtody the Goods leſt they ſhould be ſtoln, or diſpoſe of the Goods about the Funeral of the Teſtator; theſe acts do not charge a man as Executor of his own wrong. Franc. Manica de conject. ult. Volun. l. 12. tit. 9. num. 18. Fitz. Exec. num. 38,45. Bro. Admin. num. 6, 28. Swin. part 6. ſect.

ſeſſ. 22. *Brownlows Rep.* 2 *part* [illegible]
184. *Hil.* 1 *El. C. B. Dyer, fol.* [illegible]
Noyes Max. pag. 102.

309. Where ſervants aft[er] the death of their Lords or Maſt[ers] do imbezil their Goods, after full [in]formation thereof made to the Lo[rd] Chancellor by the Executors, [or] two of them, of ſuch ſpoil made the ſaid Lord Chancellor by ad[-] vice of the two Chief Juſtices and Chief Baron, or two of the[m] ſhall have power to make ſi[x] Writs to be directed to ſuch She[-] riffs as to them ſhall ſeem fit, t[o] make Proclamation in ſuch plac[es] within twelve days after the del[i]very of the ſaid Writs, as to t[he] ſaid Chancellor by advice aforeſa[id] ſhall ſeem reaſonable, that the Of[-] fender appears in the King's Ben[ch] at the day limited in the Writ, which Proclamation ſhall be ma[de] fifteen days before the day of ap[-] pearance, when, if the Offende[r] appear not, he ſhall be attainted [of] Fe[lony]

ony; and if he appear, the Ju-
ces shall commit him to prison,
ere to remain until he have an-
ered the Executors in their Acti-
, and the same Actions be de-
mined; provided that they be
rsued with effect, and not slack-
but if the Offenders procure
o sufficient men to be bound with
m in Recognizance to the Exe-
ors in the same Court where
y stand committed, to keep such
y as they shall have by the Court,
n the Justices there may bail
m; and if the Gaoler let them
o at liberty without the Iustices
der, he forfeits fourty pounds.
Stat. 33 *H.* 6. *cap.* 1. *Wingate's Abr.*
tit. Executors.

310. If any person shall obtain a-
Goods or Debts of an Intestate,
Releases or other discharge of a-
Debts or Duty, (which belonged
the Intestate) by fraud, (as
procuring the Administra-
to be granted to a Stran-
ger

ger of mean estate, and not to
found, with Intent thereby to
tain the Intestate's estate) and
upon valuable consideration, or
satisfaction of some just debt,
swerable to the value of the Goo
so obtained; in such Case such pe
son shall be chargeable as Execut
of his own wrong, so far as
value of the Goods or Debts
obtained shall amount unto, how
beit, he shall also be allowed
reasonable deduction, as other Ex
ecutors or Administrators ought
have. *49 El. chap. 8. Winga. A
Stat. tit. Executor.*

311. Note, that the time whe
in he that is named Executor in
Testament is to deliberate and
termine whether he will accept
refuse the Executorship, is left
the discretion of the Ordinary, w
not only within the year (allow
by the Civil Law) but within
month or two may cite him to
cept or refuse the Office. *Sw*

sect. 4. Refor. Legum Eccles. de Testamentis, chap. 34. pag. 143.

CHAP. X.

Of making of an Inventary, proving the Will, with the Fees thereof, and before whom it ought to be proved; and passing an Account, and paying of Legacies.

WHen an Executor intends to accept of the Office, it behoves him to make an Inventary of the Testator's Goods; for, if he meddle with the Goods, and refuse to make an Inventary, he may be punished by the Ordinary; but he may meddle with the Goods for the discharging of Funerals, and disposing of such things as can not be preserved and kept till the time of making the Inventary. *Stat. part 6. sect. 6. and 8. 21 H. 8. cap. 5.*

313. And as for the time of making the Inventary, it is left to the discretion of the Ordinary, who may appoint a longer or shorter time, according as the distance of the place where the Goods remain, or other circumstances shall minister occasion. *Lyndw. in C. Stat. verb. Arbitrio. Swin. part. 6. sect. num. 1.*

314. And as for the form thereof, it ought to be made by two at the least, to whom the Intestate was indebted, or left any legacies, and upon their refusal or absence two or more other honest men may by the Executor's appointment make the Inventary of the Goods and Chattels, Rights, Wares and Merchandises, as well moveable as not moveable whatsoever, that were of the person deceased; and the same must be indented, whereof one part is to remain with the Executor, and the other with the Ordinary, who

Executor must swear that the is true: and the usual course making of such Inventaries, is first to set down moveable Goods, beginning with his Purse and Apparel; then Houshold-stuff as it stands in every Room, beginning in the Hall, and so from room to room in order throughout the House, then Corn in the Barnes or Garners or ready sown in the Fields; then Cattel, Husband-geer, as Ploughs, Carts, *&c.* the immoveable Goods as Leases of Lands or Tenements, and after that, the Debts due to the Testator; and oftentimes at the lower end of all, the Debts owing by the Testator to other persons. *H.8. c. 5. Franc. Porcel. Trac. de Exec. Swin. part 6. sect. 9. Reg. Legum Eccles. c. de Testamentis, fol. 20.*

315. Note, that the Goods in the Inventary ought to be particularly prized and valued according to reasonable prizes, and not hudle

hudled up together several thing
in a gross sum: but those Goo
which do belong to the Heir aft
the Testator's death, must not b
put into the Inventary; neithe
may those Goods called *Bona Par*
phernalia, (which is the Wif
convenient Apparel agreeable t
her Quality) be put into the In
ventary: nay, such is the gener
custom within the Province of *Yo*
that Widows are there not only to
lerated to reserve to their own u
their convenient Apparel, and
convenient Bed and Furniture
but also a Coffer or Box with di
vers things therein, as Jewe
Chains, Borders, and other thin
necessary for their own perso
Swin. part. 6. *sect.* 9. *num.* 5. *J*
hannes Garsi. Tract. de expensis,
182. *Perkins*, *sect.* 526. *Ne*
Max. pag. 107. *Swin. part* 6. *sect.*

316. Certain Jewels to the v
lue of 500 Marks, were allow
to a Viscountess, as her *Peraph*

lia, and accounted but a reasonable allowance for one of her degree. *Viscountess Bindons case, Abr. Cases Rep. pag.* 72. *pl.* 338.

317. But note, if the rest of the Goods will not suffice to pay the Husbands Debts, then are the Wive's Jewels, Chains, Borders, and such like (being things of Decency or Ornament, and not of Necessity) to be put into the Inventory amongst other Goods of the deceased, towards the paiment of his Debts. *Swin. part* 6. *sect.* 7. *num.* 5. *in fin.*

318. Note also, that the Husband may Devise such Chains and Jewels, *&c.* though he leave sufficient Assets besides to pay his Debts, and in such case the Wife shall not have them as her *Paraphernalia*: but if the Husband make no Gift or Devise of them, and leave Assets besides to pay his debts, then the Wife in such case may keep them in despite of the Execu-

tors or Adminiſtrators. *Tr.* 8 *Car.* 1. *B. R. Lord Haſtings, and Sir Archibald Douglas caſe, Cro.* 1. *part Rep. fol.* 251, 252, 253. *And ſee Davenports caſe,* 5 *Car.* 1. *in Chancery. Compl. Attor. p.* 305.

319. If any Creditor or Legatary do affirm that more Goods came to the Executor's hands, than are named in the Inventary, he muſt prove it; for otherwiſe Credit is to be given to the Inventary. *Maſchard de Probat. Concluſio* 939. *Swin. part* 6. *ſect.* 10. *Reforma. Legum Eccleſiaſt. tit. de Teſtamentis, c.* 21.

320. If there be ſeveral Executors, and one of them exhibits an Inventary, this ſhall not charge the other in an Action brought againſt them; but the party that ſues muſt prove that ſuch Executor hath actually Adminiſtred, and that Goods came to his hands, or elſe he ſhall not be charged. *Lent Aſſizes apud Ebor.* 8 *Car.* 1. *Ireland caſe. Clayions Rep. pag.* 106. *pl.* 179.

321

321. After an Inventary made, as afore declared, then the Executor is to prove the Testament before the Ordinary, or other Judge to whom the Probat thereof belongs, and if the same be not in the Executors possession, but in some other's hands, then he may cite such person before the Ordinary; and force him to exhibit the same. *Perkins, sect.* 486. *Swin. part* 6. *fol.* 12.

322. Note, that all Testaments ought to be proved before the Ordinary, except in spiritual places where the Lords have the Probat of their Tenants Testaments before their Stewards or themselves, in their Temporal Courts. *Perkins, fol.* 486.

322. If a Lord would have the Probat of a Testament made within the precinct of his Manor, he cannot prove a Testament made without the said precinct. 2 *Rich.* 2. *Testament.*

4. In H. 7. fol. 12. Co. 2. part. Inst. fol. 391.

324. A Testament proved before the Commissary of the Bishop, or before any Officer of the Ordinary deputed to the same, is sufficient; or, if it be before the Sequestrators of the Arch-Deacon of such a place, and his Seal put thereunto, it is sufficient: for all Testaments cannot be proved before the Ordinary himself; and properly the Probat of the Will doth belong unto him to whom the Sequestration doth belong. 8 E. 3. Testament 5. 1 Hen. 6. 1. 11 H. 4. 64. Perkins sect. 490, 491. Tr. 7 E. 4. fol. 14. a.

325. A Testament after it is proved, is of so great force, that a man shall have no direct Traverse against it, because it being to be tried by the Certificate of the Ordinary, it is supposed that he will not certifie contrary to that which is shewed unto the Court, under

his Seal: but if a man be sued by an Executor after Probat, though he can have no Traverse to the Testament, yet he may say that the Testator made not the Plaintiff Executor. 18 *E.* 2. *Testament.* 6. *Perkins, sect.* 493.

326. Note, that the proving of the Testament is done two manner of wayes, either by common form, or form of Law: the common form is when the Executor after the Testator's death presents the Testament to the Judge, and produceth Witnesses to prove the same *viva voce*, without citing or calling such as have interest therein, and thereupon the Judge doth annex his Seal to the Testament. 21 *H.* 8. *c.* 5. *de Cantr. Consil.* 99. *vol.* 1. *Swin. part.* 6. *sect.* 14.

327. When it is proved in form of Law, then the Widow or next of Kin to the deceased, to whom Administration should belong, if the party had died Intestate, are

cited to be present, and the Will is exhibited and the Witnesses examined privately every one of them, as well to the Article exhibited on the Executors part, as to the Interrogatories administred on the Widow, or other adverse parties behalf; and so according to the sufficiency of the proof, the Judge doth pronounce either for the validity of the Testament, or against it, according to his discretion. *Paul. de Castr. Con. 96. vol. 1. Swin. pars 6. sect. 14. num. 3.*

328. When a Testament is proved after the common form, the parties interested may force the Executor to prove it over again in due form of Law, which may endanger the Testament if the Witnesses be dead in the mean time, unless it be after ten years space, for then it shall be presumed that necessary solemnities have been observed: but on the contrary, if it be once proved in form of Law, the

Exe

Executor is not compellable to prove the same any more. *Socin. jun. Consil. 89. vol. 1. Swin. part 6. sect. 14. Paul. de Castr. Consil. 96. vol. 1. And Simo. de Pret. Intrep. alt. Volunt. l. 2. Dub. 2. Soluc. 3. sect. 297. num. 4, and 5.*

329. Note, when any one intends to plead any thing against the validity of a Testament they ought to do it, at the time of the proving it, or within a year after, unless they were at such time Infants, or in Travel beyond the seas, so as they could hear nothing of it; and then they shall have six months after their return from Travel to plead against it, and the Minors a year after they come to full age: and if such parties exceed their limited times, then they are excluded from any remedy, unless it be in case where the Testament was not at first proved in form of Law but after the common form; for then they may cause the Testa-

ment

ment to be proved over again at any time within ten years, and alledge what they can against it. *Refor. Leg. Eccles. tit. de Testamentis, cap. 6.*

330. If any shall exhibit a false Testament, or any wayes pervert a true Testament, by adding, diminishing, changing, or interlining the same, and is openly convinced of such crime; they shall thereby be excluded from all benefit accrewing to them by such Testament. *Refor. Legum Eccles. tit. de Testamentis. cap. 39.*

331. If an Executor or Administrator, be ancient, sickly, or live far distant from the Court, where he should have the Probat of the Will, or Letters of Administration; then he may in such case have a Commission directed to two Neighbour-Ministers to take his Oath, and upon return thereof have the Probat under Seal.

332. As touching the Fees taken

ken for Probat of Wills, &c. they vary according to the custom of several Places; but where the Inventary exceeds forty pounds, the usual Fees are between five nobles and forty shillings, if it be by Commission; and if it be not by Commission, but that the Executor go himself to the Ordinary, or other Ecclesiastical Judge, who hath the granting of the same; then it will not cost so much by 13 *s.* 4 *d.* or thereabouts.

333. But if these Officers could be brought to walk by the Rules of the Statute, the Fees would be far less; for by the Stat. of the 21 H. 8. *cap.* 5. it is enacted, That if the goods of the Testator do not exceed five pounds, that then there is only due to the Scribe for writing the Probat of the Testament six pence, but nothing to the Ordinary or his Official, &c. for the Probat thereof and putting to his Seal: but then the Testament must

be

be exhibited to him in writing, with wax thereunto affixed ready to be ſealed and proved *Communi forma*; and in ſuch caſe he is to diſpatch the party without delay; and no more is due than ſix pence for granting Adminiſtration, where the Inteſtate's goods do not exceed five pounds, as aboveſaid. *Wingate's Abr. Stat. tit. Prob. of Teſtam. num.* 2. 21 *H.* 8. *c.* 5. *Swin. part* 6. *ſect.* 15.

334. When the goods of the deceaſed exceeds five pounds and are under fourty pounds; then there is due to the Ordinary for the Probat two ſhillings and ſix pence, and to the Scribe for Regiſtring the ſame, one ſhilling; and where the goods exceed fourty pounds, then there is due to the Ordinary for the Probat two ſhillings and ſix pence, as aboveſaid, and two ſhillings and ſix pence to the Scribe for Regiſtring of the ſame; or the Regiſter may refuſe

two ſhillings and ſix pence, and take a penny for every ten lines of the Teſtament, each line being to contain ten inches in the length: but note, that in all theſe caſes the Will muſt be brought to the Ordinary ready ingroſſed with wax at the ſame, if you intend to tie him to the Fees aboveſaid. *Swin. Part 6. ſect.* 15. *Refor. Legum Eccleſ. tit. de Teſt. c.* 17. *Wingate's Abr. Stat. tit. Prob. of Teſtaments, num.* 3. 21 *H.* 8. *c.* 5.

335. The Fees either for the Copy of the Will or Inventary are the ſame as are allowed for regiſtring of the Will; or the Regiſter may refuſe the ſame, and take a penny for every ten lines for the length, as aforeſaid. The Officer that takes more than his juſt Fee, ſhall forfeit that exceſs to the party grieved, and ten pounds beſides to be divided betwixt the King and the party that will ſue for the ſame in any of the King's Courts.

336. Where by custom le
hath been taken in any of the cas
aforesaid, there less is to be take
still, notwithstanding the Act o
the 21 *H.* 8. *Wingate's Abr. Sta
tit. Probat of Test. num.* 11. *Swi
part.6. sect.* 15. *num.*4. 21 *H.*8. *cap.*

337. If a Testament be in Pape
and the Executor desires that th
same shall be transcribed and in
grossed in Parchment, then he mus
agree with the Clerk for transcri
bing the same as cheap as he can
and when both are brought to the
Ordinary, it is in his choice whe
ther he will put his Seal and Pro
bat to the Original or Transcript
but there is nothing due to the Or
dinary for the Transcript, nor fo
examining the same with the Ori
ginal; but onely for affixing his
Seal and Probat he shall take such
Fees as afore declared. *Co.* 3 *par
Inst. fol.* 149, 150. *Chap. Extor
tion.*

338. And if any Ordinary or his

Of-

Officials &c. exact greater Fees than these above-mentioned, it is extortion and so it was adjudged by the whole Court of Common Bench, *Mich. 6 Jac.* upon an information against one *Rowse* Commissary of the Arch-Deacon of *Huntington*, at the suit of one *Neal*, which was for taking a Fee for ingrossing the Probat upon the transcript of the Testament, over and above his lawful Fee, due by the 21 *H.* 8. above-mentioned: and if this president were put into practice, the Probat of Testaments and granting Administrations would not be so chargeable as in most places at this day they are. *Mich. 6 Jac. C. B. Rott.* 131. *Neal and Rowse case. Co. 4 part Inst.* 336.

339. When a Will where Lands are devised comes to be proved in the Prerogative Court, they ought only to take a Copy thereof into their

their Leiger-book, and deliver the Original to the Legatee of the Lands to support his Title by, if he be questioned for the same. *Mich. 1649. B. R. Styles Regist. Practicals Pag.* 358.

340. If a man be long absent, and it be not known whether he be alive or dead; if he have made a Will, it may be proved; especially if it be reported that he is dead, and that the party absent were sickly and a very old man when he went away, or the like. *Mischard. de Prob. Conclusio* 1074. *num.* 4. *Swin. p.* 6. *sect.* 13.

341. Note, that if the party dying have at the time of his death goods or good debts in any other Diocese or Dioceses, or peculiar jurisdiction within that Province besides those goods in the place where he dyes, amounting to the value of five pounds at the least, then the Probat of such Will, or granting Administration, belongs

the Arch-Bishop or Metropolitan
of that Province; whether it be
within the Province of *Canterbury*
York; this does not prejudice
those Dioceſſes where by com-
position or cuſtom *Bona Notabilia*
are rated at a greater ſum. *Book of*
Canons, pub. 1 Jac. Anno Domini
1603. Can. 92, and 93. Perkins. ſect.
489.

342. And if the Executor or Ad-
miniſtrator cited or appearing vo-
luntarily before the Judge (appoint-
ed for Probat of Wills, *&c.* with-
in ſuch Dioceſs or peculiar Ju-
riſdiction where the party died)
do upon his Oath affirm, that the
party deceaſed had goods or good
debts to the value of five pounds,
foreſaid, in any other Dioceſe
or Dioceſes, or peculiar Juriſ-
diction within the ſaid Pro-
vince; then is the Judge to diſ-
miſs him, and admoniſh him to
prove the ſaid Will, or require Ad-
mini-

miniſtration of the goods in the Prerogative Court of the Arch Biſhop of the Province, and afterwards to exhibit the Probat of Adminiſtration under Seal of the ſaid Prerogative-Court before him the ſaid Judge, within forty dayes then next following: and the ſaid Judge ſo diſmiſſing the party, as aforeſaid, ſhall not exact or take any charges of the ſaid parties, more than ſuch only as are due for the Citation, and other Proceſs had and uſed againſt ſuch perſons upon their contumacy: and if any Judge or their Regiſter ſhall offend therein he is to be ſuſpended from his Office, *ipſo facto*, and not to be abſolved till he have paid to the Party all his expence laid out contrary to the tenor of the premiſſes. *Ban. Can. 1 Jac. Ann. Dom. 1603. Can. 92 and 93. Swin. part 6. ſect. 11.*

343. Note, that the Probat of every Biſhop's Teſtament, or granting Adminiſtration of his goods (although

though he have no Goods but within his own Jurisdiction where he was Bishop) doth belong to the Arch-Bishop within whose Province the party deceased was Bishop. *Co. 4. part Inst. fol.* 335.

344. If any Ordinary of a Diocess, or Commissary of a peculiar Jurisdiction commit Administration of his Goods, that hath *Bona Notabilia*, as aforesaid, in divers Diocesses, it is utterly void to all intents and purposes, as well concerning goods in his own Diocess as elsewhere. But if the Metropolitane do commit Administration, supposing the party deceased to have *Bona Notabilia*, whereas he hath but Goods only in one inferiour Diocess; this Administration is not void, but only voidable by Sentence, for that the Metropolitane hath Jurisdiction over all the Diocesses within his Province. 22 *El. B. R. Veer and Jefferies Case, vouched in Co. 5 lib. fol.* 30. *in Princes*

Princes caſe, and Mores Rep. the ſame caſe.

345. Note, that in former times (when Popery and Idolatry reigned in this Kingdom) every Executor or Adminiſtrator was to paſs his Account to the Ordinary, how he had performed his Office and if any thing remain in the Executor's hands after the payment of the Teſtator's Debts, then the Ordinary uſed to appoint the paiment of ſuch Reſidue to pious uſes; but this is now of little uſe, for at this day the Ordinary cannot compel the Executor to make ſuch diſtribution; for, if any thing remain, the Executor or Adminiſtrator may keep the ſame, and convert it to their own uſe. *Swin. part 6. ſect. 20. num. 26.*

249. Upon the paſſing an Account, as aforeſaid, it was uſual to call the Creditors to whom the Teſtator was indebted, and alſo the Legataries, and all others having intereſt,

terest, before the Ordinary to whom the Probation appertained, and they were to hear the Account: and if it appeared to the Ordinary that the Executor had faithfully executed his Office, and duly Administred; then he might acquit the Executor, and give Letters of discharge from being any further troubled, at least in the Ecclesiastical Court; but, if the Account were made in the Creditors absence, and they never called, such Account doth not prejudice them. *Swin. part. 6. se. 20. Lindw. in c. 1. sect. Et postquam verb. Ordinarii.* 347. And if any inferiour Judge under the degree of a Bishop, should grant unto any Executor Letters of Acquittance or final Discharge before a lawful Account made, that is *ipso facto* suspended *ab ingressu Ecclesiæ* by the space of six Months, and the Executor doth receive no benefit by such acquittance. *Lindw. in D. c. in fin. verb.*

Ac-

Acquietantiarum. Swin. part 6. sect. 21. num. 3.

348. As touching Mortuaries it is enacted by Authority of Parliament, That no Parson, Vicar, Curate, parish-Priest, nor any other spiritual Person, nor their Farmers or Lessees shall demand any Mortuary for any person dying, but in such places only where Mortuaries have been used to be paid and given in those places, according to the rates hereafter mentioned; and that no person pay in more places than one, and that is in the place of their most dwelling or habitation. *21 H. 8. c. 6. Swin. part 6. sect. 16. Wingate's Abr. Stat. tit. Mortuaries.*

349. If a Person at the time of his Death be not worth in Moveable Goods to the value of ten Marks, no Mortuary is then due; if he be worth ten Marks or more, clearly above his debts paid, and under thirty pounds or above, any

under forty pounds, then a Noble is due, and if he be worth forty pounds, or above, to any sum whatsoever, then ten shillings is due: and if any of the Persons before-named take more than is here set down, they forfeit forty shillings, and so much more as they took more than their due: and in such places where less hath been accustomed to be paid, no person shall be compelled to pay more than according to the custom in such place. *Wingate's Abr. Statut. Tit. Mortuaries. 21 H.8. c.6. Swin. part. 6. fol. 16.*

350. Note, that no Mortuary is to be paid for a woman being Covert-Baron, nor for a Child, nor for any person not keeping house, and if a way-faring man die, his Mortuary is to be paid in such a place where he had the most habitation, if Mortuaries be accustomed to be paid in such place. *Wingate's Abr. Stat. Tit. Mortuaries. 21*

H.8.c.6. Swin. part 6. sect. 16.

351. The Bishops of *Bangor*, *Landaff*, *St. Davids* and *St. Asaph*; and the Arch-Deacon of *Chester*, may take such Mortuaries of their Priests within their Dioceses and Jurisdictions, as heretofore hath been accustomed. 21 *H. 8. c. 6. Swin. part 6. sect. 16. Wingates Abr. Stat. tit. Mortuaries.*

352. Where Mortuaries are due, they are to be paid out of the deaths part only, and not out of the whole before Division, where the Widow and Children are to have their reasonable parts; and such Mortuary is to be paid before any other Legacy whatsoever. *Hostiens. in C. conquerente de Offic. Ordin. Verb. Mortuar. Swin. part 6. sect. 16. in fin.*

CHAP.

CHAP. XI.

Of the Power of the Ordinary in granting Administrations, and some few Cases touching Appeals, and also of the Office of an Administrator, and how far the Ordinary is chargeable for the Intestates Debts.

353. ORdinary in the usual and common sense signifieth Bishop, and is derived *ab ordine*: but generally by the Law *Ordinarius* is not only taken for a Bishop, but every one that is *in loco Episcopi*, as Guardians of the Spiritualities, and such as have peculiar and exempt Jurisdiction Ecclesiastical, and be immediate Officers to the King's Courts of Justice. *Co. 1 Lit. fol.* 344. 18 *El. Dyer fol.* 350. *Regist. fol.* 67. *Ca.* 2 *part Inst. fol.* 398.

354. If a Caveat be entred with the Bishop, that he should not admit any without giving notice, yet notwithstanding he may admit

one to the Adminiſtration: but if it be one who hath no right that is admitted, he is then a diſturber, otherwiſe the Caveat doth nothing but onely to make the Biſhop careful what perſon he admits. *Brownlowes Rep. 2 part fol. 119.*

355. The Ordinary is to commit Adminiſtration of the goods of one dying Inteſtate to the Widow or to the next of his blood, if they will accept it, or to both: and where divers are next of blood, and in equality of degree, and do claim Adminiſtration; in ſuch caſe, he may grant it to which of them he pleaſeth: or, where one claimeth as next of blood to the Inteſtate where in truth divers are in equality of Kindred; here the Ordinary ſhall be at his choice to accept one or more making Requeſt: and where but one or more, and not all are in equality of Kindred, and do make Requeſt, the Ordinary is at liberty to admit the Widow, and

him or thoſe only making Requeſt, or any one of them, at his pleaſure: and if the Ordinary do not obſerve theſe Rules, he forfeits ten pounds, by the 21 *H.* 8. *c.* 5. *Fynch. c.* 16. *page* 174, 175. *Noys Max. pag.* 105. *Styles's Regiſt. Practicale.* 92. *Mich.* 24 *Car.* 1. *B. R. Refor. Legum Eccleſ. tit. de Teſtamentis* 242.

356. One of the half-blood is in as equal degree of Kindred, to have the Letters of Adminiſtration committed to him, as one of the whole blood is. *Mich.* 23 *Car.* 1. *B. R. Styles Rep. fol.* 74, 75. *and Paſch.* 24. *c.* 1. *B. R. Hill and Brides caſe. Styles fol.* 102.

357. If the Ordinary take any Reward or Fee for preferring of any one perſon before another to the Adminiſtration, it is Bribery, and puniſhable with Fine and Imprisonment at the King's pleaſure, and frequently loſs of their place. *Co.* 3. *part Inſt. fol.* 148. *cap. Brib. in fine.*

358. When the Widow or next of Kin cited, and refuse the Administration, then the Ordinary may grant it to some of the Creditors, or to some other such as he thinks fit. *Herne's Law of Conveyances. Page 86.*

359. Where divers are made Administrators, they have but one joint interest, and therefore one of them cannot discharge a Debt by himself in prejudice of the others, as one Executor may do, as is shewed before in the ninth Chapter; but in such case all the Administrators must joyn. *Hernes Law Convey. pag.* 88.

360. If Administration be unduly granted to such a person as ought not to have the same; in such case the Ordinary may revoke the same afterwards: but if it be duely granted to those who of right ought to have the same, then he cannot lawfully revoke it; and if there be a suit depending to that pur-

purpose in the Spiritual Court, a Prohibition will be granted. *Clerks case, Mich. 20 Jac. B. R. Rott. 2196. Vide Cro. 1. part, Fotherbies case: and Pasch. 21 Car. B. R. Bettesworth and Bettesworths case. Styles Rep. fol. 10.*

361. If Administration be unduly granted by the Ordinary of an inferiour Diocese, the party grieved cannot have a Prohibition at the Common Law, but he must appeal to the Metropolitan or Archbishop of the Province, from thence to the Court of Delegates: for the Stat. of 21 *H.* 8. doth not say that the Administration shall be committed to the next of blood, or else the Administration to be void; but that it shall be granted on such a pain: and so it doth not take away the Cognizance of the Case from the Ecclesiastical Judge. *P. 1 Car. 1. B. R. Mayowes ca. Laiches Rep. fo. 67. M. 24 Car. 1. B.R. Browne and Poynes case. Styles Rep. fol. 147.*

362. If one die Intestate, and the Ordinary grants Administration to a Stranger, and the next of Kin sues a Citation out of the Spiritual Court to have the Administration revoked; and pending the Suit, the Administrator sells the Goods to defeat the next of Kin, and then the Letters of Administration granted to the Stranger are revoked and made Null by Sentence: yet, in this case the Sale by the first Administrator is good: but if the next of Kin had appealed to have the Administration revoked, and pending the appeal, the first Administrator sells his Goods; then in such case the sale is void: and so note the difference between a Suit by Citation to revoke a former Administration, and an appeal; for an appeal doth suspend the former Sentence. 37 *El. B. R. Packmans case. Co. 6. l. fol. 28. Vide Harlings case. Claytons Rep. 25.*

363. Where an appeal is made, and

and the first Administration is confirmed, then the use is to send back the Cause to the Court from whence it came by appeal: but when the first sentence is reversed, then the first Court is outed of its Jurisdiction, and the Court which reverses it shall commit the Administration *de novo*. *Pl. 1 Car. 1. B. R. Reeve and Dennyes case. Latch. 85.*

364. Appeals in Cases Testamentary, Matrimony and Tythes, must be sued from the Arch-Deacon or Official (if the matter be there commenced) to the Bishop of the Diocese; and from the Bishop Diocesan, or his Commissary in such case, (or when the matter is there commenced) within fifteen days after sentence given, to the Arch-bishop of the Province and no farther, but there to be definitively adjudged. See *num.* 368. *24 H. 8. c. 12. Wing. Abr. Stat. tit. App. to Rome, nu. 5. Co. 4 part Inst. f. 338.*

365. When the Cause is commenced before the Arch-deacon, or Commissary of the Arch-Bishop, the appeal may be made (within fifteen days after sentence given) to the Court of Audience of the said Archbishop, and from thence, within fifteen dayes after sentence, there to the Arch-bishop himself, and no further: when the Cause is commenced before the Archbishop himself, it was to be determined there without further appeal, by the Stat. 24 *H.* 8. *c.* 12. 24 *H.* 8. *c.* 12. *Wing. Abr. Stat. tit. Appeals to Rome, num.* 6 *and* 7. *Co.* 4 *part Inst. fol.* 339.

366. But see the Stat. 25 *H.* 8. where it is added further, that appeals shall be from the Arch-bishops Courts to the King in his Chancery, where a Commission shall be awarded under the Great Seal to certain persons to be named by the King, for the determination of the said appeals, and from thence no further; and these Commissioners

are called Delegates, becauſe they are delegated by the King's Commiſſion. *Co. 4 part Inſt. fol. 339, 340. 25 H. 8. c. 19. VVingate's Abr. Stat. tit. Appeal to Rome. num. 4.*

367. When the Cauſe or Suit concerns the King, the party grieved may (within 15 dayes after Sentence given) appeal from any of the ſaid Courts Eccleſiaſtical to the higher Convocation-houſe of that Province, and no further; and there to be finally determined. *24 H. 8. c. 12. Co. 4 part Inſt. fol. 322 and 339. in fine.*

368. Appeals from places exempt, which were before to the See of *Rome*, ſhall be into the Chancery, *ut ſupra*, and not to the Arch-biſhop; and ſhall be determined by the Delegates. *25 H. 8. c. 19. Co. 4 part Inſt. fol. 340.*

369. But note, that where it is ſaid in the caſe aforeſaid, upon the Statu

Stat. of the 24 and 25 H. 8. that the Sentence shall be definitive upon certain appeals there mentioned; yet notwithstanding, the King as Supream Head, upon complaint to him made, may grant a Commission of Review; for so the Pope used to do as Supream Head; and the same power which the Pope had formerly doth now of right belong to the Crown, and is annexed thereunto by the 26 H. 8. c. 1. and 1 Eliz. c 1. And so it was resolved, Tr. 59 El. B. R. where the case was, that sentence being in an Ecclesiastical cause in the Countrey, the party grieved appealed to the Arch-Bishop where the first sentence was affirmed; from thence he appealed to the Delegates, before whom both the former Sentences were repealed, and made void by definitive sentence: and thereupon the Queen as Supream Head granted a Commission of Review *ad Revidendum* the sentence of the

Dele-

Delegates. *Co. 4 part Inſt. fol. 341. H. 39. tit. E. R. Hollingworths caſe. Faſtal Rome 389.*

370. If the Ordinary knowing that there is a Teſtament and an Executor named therein, will notwithſtanding grant Adminiſtration of the deceaſed's Goods, not having firſt called the Executor before him to prove the Will, or to accept or refuſe the Executorſhip; then in ſuch caſe, when the Executor ſhall prove the Will, he may ſue the Adminiſtrator in an Action of Treſpaſs, notwithſtanding the Adminiſtration granted by the Ordinary. *Swin. part 6. ſect. 2.*

371. If a man be Executor to one, who was Adminiſtrator to another man, in this caſe he ſhall not have adminiſtration of ſuch Goods as his Teſtator had by virtue of the Adminiſtration; but the Adminiſtration thereof ſhall be committed to the next of kin to him that died firſt. *Vide H. 43.*

El. C. B. Thorn's case, Goldes. Rep. pag. 182. *pl.* 118. *Hernes Law Convey. pag.* 88. *Fitz. Abr. tit. Admin. num.* 3. *Swin. part* 6. *sect.* 3. *num.* 12.

372. If an Executor in an Action brought by him recovereth, and afterwards dieth Intestate, and then Administration of the Goods of the first Testator is committed to *J. S.* in this case *J. S.* before the *Stat.* of the 17 *Car.* 2. could not sue out Execution upon such Recovery, but was to begin anew; because he comes in paramount to the Executor, and claims immediately from the first Testator: but see now the late Act made at *Oxford*, 7 *Car.* 2 for avoiding of the unnecessary suits and delays, it stands on continuance for five years, and from thence to the end of the next Session of Parliament. *Co.* 5. *lib. fol.* 9. *in Brudenels case. Cro.* 2 *part. Yare and Goughs case,* 1 *Jac. B. R and M.* 4 *Car.* 1. *B. R. Snape and Norgates case. Cro.*

Cro. 3 *part, and Mores Rep. Levet and Lenkner case* 1 *but see now the Statute at Oxford,* 17 *Car.* 2. *for avoiding unnecessary suits and delays.*

373. If an Administrator during Minority of an Infant-Executor, recover in Debt, and the Executor comes to age before Execution taken out; in such case he may sue out a special *Scire facias* upon the Record, and so sue out Execution in his own name. *Vide* 27 *H.* 8. *fol.* 7. *a. Brownlows Rep.* 2 *part. page* 83, 84.

374. An Administrator is not liable to an Action for a Debt upon a Contract of the Intestates. *Mich.* 30, 31 *El. B. R. Hughsons and Webbs case, Cro.* 1 *part.*

375. But if the Administrator after the Intestates death, promise to pay such a Debt; if there be a consideration to ground the Action on, it is binding. As thus:

the

the Husband was indebted to another man upon a Contract for Beer, and died Inteſtate; the Wife took adminiſtration, and afterward aſſumed upon her ſelf to the Creditor, that if he would deliver her ſix Barrels of Beer, ſhe would not only pay for them, but her Husband's debt alſo; in this Caſe it was adjudged, that Judgment ſhould be entred *de bonis propriis* generally, for it is become a Charge by her own Act; and by her promiſe as Adminiſtratrix, ſhe hath made it her own debt. *Tr.* 27 *El. B. R. in Wheeler and Colliers caſe. Cro.* 1 *part Rep.*

376. A Rent was graned to the Husband and Wife for their lives; the Rent is behind, and the Husband dies, and then another Rent becomes in arrear, and the Wife dies Inteſtate; and the Adminiſtrator brought an account of debt for both Rents in arrear, as well in the Husband's life-time, as in the Wife's,

Wifes, and adjudged the Action did well lie. *Mic.* 42, 43 *El. B. R. Temple and Temples case. Cro.* 1 *part Rep. fol.*

377. If Administration of the debtor's goods be committed to the Creditor, it doth not extinguish the debt; but if the Creditor make the debtor his Executor, it is a release, in Law, of the debt: but if a Woman-Executrix take the debtor to Husband, this is no release of the debt; for if he die, she may sue his Executors; for the debt was but suspended during the Coverture. *M.* 13 *El. B. R. in Crosman and Reads case. Leonards R. p. fol.* 320. *Co. & li. fol.* 135. *in Sir John Needhams case, and Mich.* 1652. *B. R. Rott.* 686. *Ashby and Childs case. Styles Rep. fol.* 384.

378. Where an Infant is made Executor, and Administration is committed *durante minori ætate*, and the Administrator hath goods in his hands to a great value, and the Infant

Infant at his full age releases to the Administrator all demands; this release shall be charged as assets in the Infants hands, for so much as he released to the Administrator. *Mich.* 15. *El. Owens Rep. fol.* 3. *and M.* 37 *El. C. B. Rittley's case. Godbolts Rep. fol.* 29, *and* 30.

379. An Administrator may bring an Action of Trespass or Trover and Conversion, for goods taken away before he obtained the Administration; for the Letters of Administration shall relate to the time of the Intestates death, and not to the time of granting them. *M.* 1652. *B. R. Long and Hebbs case. Styles Rep. fol.* 341. *M.* 3 *Car.* 1. *B. R. Hudson and Hudson's case. Latches Rep.* 14. 36 *H.* 6, 7. *Finches Law, l.* 1. *c.* 5.

380. An Administrator may retain Money in his own hands to satisfie his own Debt, in prejudice of other like Creditors of the Intestates, as well as an Executor may

do.

do. *M.* 11 *Jac. Bond and Greens caſe, Godbolts Rep. fol.* 216. *Tr.* 13 *Jac. Rot.* 1606. *C. B. Wainford and Wayners caſe. Brownlows Rep.* 1 *part fag.*80.

381. An Adminiſtration may be granted upon Condition; and if the Condition be not performed, it may be revoked or repealed: but then, if the Adminiſtrator before the Condition broken, give away the goods, or ſell them, ſuch acts are good. *Co. 6. lib. fol.* 19.

382. Note, if the Teſtators words be indifferent to make an Executor, or univerſal Legatary; a Teſtament, or a Codicil; in ſuch caſe it is uſual to commit the Adminiſtration to the Widow or next of Kin, deeming the party to have died inteſtate. *Franc. Mantica de conject. ult. volunt. lib.* 2. *Tit.* 3. *num.* 12. *Swin. part* 4. *ſect.* 4. *num.*8.

383. Note, That the Ordinary may call the Adminiſtrator to account,

count, but he cannot force him to make diſpoſition of the ſurpluſage of the Inteſtates goods, after debts paid, by the true meaning of the 31 *H.8.c.5.* but what remains ſhall go to the Adminiſtrator, in caſe there be any more debts to pay, which as yet are not come to his knowledge: and if the Ordinary will meddle to cauſe a diſpoſition to be made, a Prohibition will be granted againſt him, if the Adminiſtrator requeſt it. *M. 6 Car. 1. B. R. Levans caſe. Cro. 3 part Rep. fol. M. 15 Jac. C. B. Tooker and Loans Caſe. Hobbarts Rep. fol. 190. Paſch. 24 Car. 1. B. R. Hill and Birds caſe. Styles Rep. fol. Brownlowes 1 part Rep. p. 32. And vide Slawneys caſe. Hobbarns Rep fol. 83.*

384. An Adminiſtrator accompted before the Ordinary, and proved payment by one Witneſs, and becauſe the Ordinary would not allow of proof by one Witneſs, but did excommunicate the party for want

want of proof: a Prohibition was thereupon granted, and the Book ſays there, that the Juriſdiction of the Spiritual Court is not taken away by the Prohibition, but their Proceedings only. *P. 2 Car. B. R. Bellamy and Aldens caſe. Latches Rep. fol.* 117.

385. Now as touching the Intereſt of the Ordinary in the goods of the Inteſtate that comes to his hands: note, that it is only ſuch an intereſt as an Adminiſtrator *durante minori ætate Executoris* hath; and therefore he cannot give nor ſell the Goods of the Inteſtate, or do any thing to his prejudice. *M. 9 El. Dyer, fol.* 256. *Co. 2 part Inſt. fol.* 398.

386. And ſo, if the Ordinary make a Letter to one *Ad colligendum bona Defuncti, & ad vendendum ea quæ peritura eſſent, & inde Compotum reddere*: In this caſe, if the Grantee ſell the Goods, he may be charged as Executor of his

his own wrong; for the Ordinary himself having not power to sell, cannot give more power than he hath. *Swin. part* 4. *sect.* 16. *in fine. M.* 9 *El. Dyer, fol.* 256.

387. If no goods come to the hands of the Ordinary, he is not chargeable by the Law; but if any come to his hands and possession, and he will neither Administer and pay the Debts and Duties himself, nor commit Administration to the Friends and Kin of the Intestate that would, then he is chargeable by the Law, for so much as comes to his hands, and is liable to the same Actions as other Administrators are: But the Ordinary cannot have an Action of Debt, Covenant, nor any other Action which belonged to the Intestate; but he to whom he commits Administration may: so that he is subject to the charge and trouble of an Administrator, but is excluded from the priviledges belonging to

an

an Administrator. 7 H. 4. fol. 18. F. N. B. 92. a. Co. 2 part Inst. fol. 398. West. 2. c. 19. Fynches Law, page 174.

388. If an Action of Debt be brought against the Ordinary for a Debt of the Intestate's, after notice given him of the same, he may not Administer to others, if he have not sufficient to satisfie that Debt. M. 7 El. Dyer, fol. 233.

389. If the Ordinary take goods of the Intestates into his hands, and after commits Administration, and notwithstanding still retains the goods, in this case he shall be charged still as if he had not at all committed any Administration. 12 R. 2. Admin. 21. Co. 2 part Inst. fol. 398.

390. Where the Ordinary doth take Goods of the Intestates, being out of his Diocese, here he shall not be charged as Ordinary, but as Executor in his own wrong. 12 R. 2. Adam. 21. Co. 2. part Inst. fol. 398.

391. If the goods of the Intestate's come to the hands of the Ordinary, and he dieth, his Executors or Administrators shall be charged in an Action of debt, by the *Stat. Westm. 2. c. 19. Westm. 2. c. 19. Co. 2 part Inst. fol. 398. Regist. fol. 141. 11 E. 3. Exec. 177.*

392. Having spoken before concerning a Codicil, I thought good here to insert the usual form thereof, as followeth, *viz.*

393. *Be it known unto all men by these Presents, That whereas I* Henry Walker *of* R. &c. *have made and declared my last Will and Testament in writing, bearing date, &c. I the said* Henry Walker, *by this present Codicil, do confirm and ratifie my said last Will and Testament, and do give and bequath unto* Roger Myton *of* Lympton *my best Suit of Clothes; and my Will and meaning is, that this Codicil or Schedule be, and be adjudged to be part and parcel of my said last Will and Testament; and that all things*

things herein contained and mentioned, be faithfully and truly performed, and as fully and amply in every reſpect, as if the ſame were ſo declared and ſet down in my ſaid laſt Will and Teſtament. In Witneſs whereof I the ſaid Henry Walker *have hereunto ſet my Hand and Seal, this* 25th *day of* July, *in the* 19th *year of the Reign of our moſt Gracious Soveraign Lord King* Charles *the Second, and in the year of our Lord God* 1667.

FINIS

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